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## In The
## Supreme Court Of The United States

OCTOBER TERM, 1983

No._____

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WILLIAM H. STEPNEY, JR.,
*Petitioner,*

v.

STATE OF CONNECTICUT,
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT**

**CRIMINAL MATTER**

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December 7, 1983

## Preliminary Matters

### 1. QUESTIONS PRESENTED

1. Does the holding of the Connecticut Supreme Court, that a prearrest statement by the petitioner to an interrogating police officer that he wants to stop answering questions and consult with an attorney, and his demeanor while making such statement, constitute an admission which is admissible against the petitioner at his subsequent trial, violate the Fifth and Fourteenth Amendment rights of the petitioner?

2. Does a jury charge which singles out the credibility of the petitioner's wife, his chief alibi witness, and calls to the attention of the jury possible inconsistencies in her testimony, to the exclusion of all other witnesses, most of whom also had inconsistent testimony, violate the due process rights guaranteed the

petitioner by the Fourteenth Amendment to the United States Constitution?

3. Does a jury charge which singles out the credibility of the petitioner and calls to the attention of the jury his interest in the outcome of the case violate the due process rights guaranteed the petitioner by the Fourteenth Amendment to the United States Constitution?

4. If Questions 2 and 3 above standing alone do not constitute due process violations, do such jury charges, focusing on the petitioner and his wife in the same trial, violate the due process rights guaranteed the petitioner by the Fourteenth Amendment to the United States Constitution?

## 2. LIST OF ALL PARTIES

All parties appear in the caption of the case in this Court.

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In The

Supreme Court of the United States

October Term, 1983

No. .....

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WILLIAM H. STEPNEY, JR.,

Petitioner,

- V. -

STATE OF CONNECTICUT,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE
STATE OF CONNECTICUT

CRIMINAL MATTER

---

The petitioner, William Stepney, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on August 30, 1983.

## OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut appears in the Appendix hereto.

## JURISDICTION

The judgment of the Supreme Court of the State of Connecticut was entered on August 30, 1983. A motion to reargue in accordance with the Connecticut Rules for the Supreme Court was filed on August 31, 1983. The order of the Supreme Court of the State of Connecticut denying said motion to reargue was entered September 21, 1983.

The present petition for certiorari was filed within 90 days of the denial of the motion to reargue. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 5:

No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of ... liberty ... without due process of law, ....

United States Constitution, Amendment 14:

... nor shall any state deprive any person of ... liberty ... without due process of law; ....

## STATEMENT OF THE CASE

The defendant was indicted by a grand jury[1] for the crime of murder in violation of Connecticut General Statutes, §53a-54a. On November 10, 1980, the petitioner was

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[1] Following the indictment, but before trial, the trial court reserved to the Connecticut Supreme Court the question of whether the charge on intent to the grand jury complied with due process. Cf. Sandstrom v. Montana, 442 U.S. 510 (1979). The court upheld the charge and a petition for a writ of certiorari was denied by this Court. State v. Stepney, 181 Conn. 268, 435 A.2d 701 (1980), cert. denied, 449 U.S. 1077 (1981).

convicted by a jury. On January 6, 1981, the petitioner was sentenced by the Superior Court for Litchfield County to a term of imprisonment of not less than 22 years nor more than life imprisonment. He was released on bond pending appeal.

A timely appeal from the judgment of conviction was taken by the petitioner to the Supreme Court of the State of Connecticut. On August 30, 1983, that court released its decision affirming the judgment of conviction. A timely motion to reargue was filed by the petitioner and on September 21, 1983, that motion was denied.

## STATEMENT OF THE FACTS

### 1. DISCOVERY OF BODY

On May 9, 1979, at approximately 3:30 p.m., the body of Barbara McKitis was discovered by Jimmy Brown, age 9, who looked in a bedroom window and saw her partially clad body covered with blood and

the room in disarray. (Trial Transcript (hereinafter "T.T.") 7-8; 29-32). The victim had been beaten and stabbed numerous times. (T.T. 200; State's exhibit 21)

A subsequent autopsy revealed a number of "defensive wounds" on the victim's right hand as though she had fended off blows. (T.T. 285-286; 353) Her blood alcohol content was .21%, alcohol in the urine was measured at .33% and in her stomach contents at .055%. (T.T. 333; 1527) The stomach contents were devoid of food but contained a quantity of a dark liquid. (T.T. 286-287; 328)

The medical examiner concluded that the cause of death was multiple injuries of the head and chest, incised wounds of the head, stab wounds of the neck with a cutting of the right vertebral artery and external hemorrhage. (T.T. 288) He was unable to give a precise estimate of the

time of death. (T.T. 287) On direct examination, and based on the assumption that the victim was last seen at 9:30 in the morning, and that her body was discovered at 3:45 p.m., he opined the death occurred closer to the last time she was seen alive, i.e. the morning hours. (T.T. 287) On cross examination, the doctor said that his opinion was based in part on the representation that the victim was last seen alive at 9:30 a.m. (T.T. 358) When presented with evidence that people had seen Mrs. McKitis as late as 12:35 p.m., the doctor said the physical signs he had seen would be consistent with a time of death sometime between 12:30 and 1:00 p.m. (T.T. 358-359) He acknowledged that fixing a time of death is imprecise. (T.T. 359)

2. WILLIAM STEPNEY

On May 9, 1979, William Stepney, Jr. was 64 years of age and had resided in Morris, Connecticut for some 16 years.

(T.T. 1870) He was married to Lillian Stepney, his wife of 44 years, and had 4 children. (T.T. 1871) His daughter resided across the street from the home of the victim. (T.T. 1882) He was retired from employment and lived on a disability pension. (T.T. 1871) His last employment had been working for the Town of Morris on the town highway crew. (T.T. 1872)

Mr. Stepney was treated for cancer of the larynx and as a result had his voicebox removed. (T.T. 1873) He was able to breath through a hole in his throat which permitted the air to go directly to his lungs. (T.T. 1873) As a result of this operation, it was difficult for him to speak, requiring him to gulp air into his stomach and force the words out in that fashion. (T.T. 1873)

In addition to the operation for throat cancer, Mr. Stepney had suffered a

duodenal ulcer and had had two-thirds of his stomach removed. (T.T. 1877) He suffered from a chronic heart condition and as a result was prescribed Inderal and nitroglycerin pills. (T.T. 1877) Because of his heart condition, he was short of breath and he was unable to engage in vigorous activity. (T.T. 1878)

Due to the type of employment he engaged in as a young man, he suffered from an extreme case of tendonitis and was unable to fully open or close his hands. (T.T. 1878) He had tendonitis of the shoulders such that he was unable to raise his arms. (T.T. 1879-1880) All of his physical conditions were attested to by his treating physician. (T.T. 1753-1758)

Mr. Stepney had a history of heavy alcoholic use. (T.T. 1880) In 1977, he was hospitalized because of heavy alcoholic intake coupled with the numerous medica-

tions he was taking for his physical problems. (T.T. 1769-1770; 1881) Upon his release, the heavy drinking ceased, although he did acknowledge drinking beer. (T.T. 1770; 1881)

3. EVENTS OF MAY 7, 8, AND 9, 1979

Mr. Stepney first met Mrs. McKitis on a Thursday [May 3, 1979] (T.T. 1882) Mrs. McKitis, who was going through a divorce, was selling off the personal property in her house. (T.T. 911; 1046-1047; 1882) Mr. Stepney visited the victim's house in the early evening of that Thursday with his wife and his daughter, who lived across the street from Mrs. McKitis. (T.T. 1882) There was no discussion between Mr. Stepney and Mrs. McKitis during that first visit about the removal of any scrap material from her property. (T.T. 1883-84)

Mr. Stepney next saw Mrs. McKitis on the following Saturday. (T.T. 1884) He

went to the McKitis residence with his wife, grandson, and his daughter and ended up making a purchase. (T.T. 1886)

On Monday evening, May 7, 1979, Mr. and Mrs. Stepney again visited the McKitis' residence. (T.T. 1893) As a surprise mother's day gift, he and his daughter purchased a washing machine for his wife. (T.T. 1790; 1894) At that time, Mrs. McKitis told Mr. Stepney that she had a quantity of scrap metal in her garage of which she wanted to dispose. (T.T. 1895) Mr. Stepney agreed to clean out the garage and take the scrap metal to a junk dealer. (T.T. 1049; 1895) The agreed upon price was that he would keep 50% of the proceeds from the sale of the scrap, plus an amount to pay for the gas in his pickup truck. (T.T. 1791; 1895; 1929)

On May 8, Mr. Stepney returned to the McKitis home with his blue Ford pickup

truck. (T.T. 1181; 1897) He parked the truck by the McKitis' barn and spent virtually the entire day loading the vehicle with scrap metal. (T.T. 1897) Included in the material were some old radiators that he moved by tipping them over end to end. (T.T. 1899) At one point during the day, he purchased an 8-pack of 8 ounce cans of Budweiser beer. (T.T. 1899-1900) He had at least one beer with Mrs. McKitis (T.T. 1900) and consumed a number of others while loading the trash. (T.T. 1899-1900)

He entered the McKitis' house on one occasion to look at a radiator upstairs but advised Mrs. McKitis that it was too big to handle alone. (T.T. 1900) He left the McKitis' home at approximately 4:00 p.m. on May 8 and drove his truck, fully loaded, to his home in Morris. (T.T. 1900-1901)

Bill Stepney was seen in a number of places on May 9, 1979, by various witnesses. In addition, he and his wife gave statements to the state police and testified as to his whereabouts on that day. The following chronology is a composite of the statements of witnesses and of Bill Stepney as to his whereabouts.

Mr. Stepney left his home on May 9, 1979 at approximately 7:00 a.m. (T.T. 1902) and drove his loaded pickup truck to Oakville, Connecticut where he met his friend, George Pierce, at approximately 7:30 a.m. (T.T. 1075; 1907) Pierce joined Stepney in the truck and drove to Albert's Junkyard in Waterbury, Connecticut (T.T. 1907-09), arriving at approximately 8:00 a.m. (T.T. 1110; 1910) After off loading the scrap metal and being paid, Stepney and Pierce drove to another site in Oakville and picked up an old metal sink. (T.T.

1912) They returned to Albert's Junkyard and were paid for the sink. (T.T. 1912)

At approximately 8:30 a.m., the two men stopped at the Pickeze Market in Oakville and purchased a 6-pack of beer. (T.T. 1077-78; 1913) The two drank a beer while seated in the pickup truck. (T.T. 1102) At approximately 8:45 a.m., Stepney left Pierce off and returned to his home in Morris after first stopping at a market in Watertown. (T.T. 1106; 1915-16) He was observed on the dirt road leading to his house at approximately 9:00 a.m. (T.T. 1209)

The Stepney home is located on Isaiah Smith Lane in Morris. (T.T. 1904-1905) At the time, because this road was being paved, access to the Stepney home could only be gained from one direction. (T.T. 1134) The town road crew which was working on the road knew and had worked with Bill

Stepney. (T.T. 1133) At sometime between 9:30 and 10:00, Mr. Stepney stopped and spoke for 5 or 10 minutes with John Panilaitas, the road foreman. (T.T. 1130; 1139; 1917) (T.T. 1130; 1139) Panilaitas observed Stepney leave heading in the direction of his home. (T.T. 1130; 1139) Approximately one-half to three-fourths of an hour later, Panilaitas observed Mr. Stepney's truck, which he recognized, driving out of Isaiah Smith Lane. (T.T. 1130-31; 1140)

At sometime between 11:45 and 12:00 noon, the road crew stopped to eat lunch. (T.T. 1131) While doing so, they observed the Stepney vehicle returning on Isaiah Smith Lane driving in the direction of his house. (T.T. 1131) The road crew was able to establish the time of Stepney's return by the fact that, because of the warm weather, they had broken for lunch early

before the noon whistle blew and were actually eating their lunches when Stepney drove by. (T.T. 1141-42) They observed nothing unusual about his conduct and he waved and drove at a moderate speed. (T.T. 1142)

Several other witnesses placed Stepney in various locations on May 9. Deborah Palmer thought she saw Bill Stepney at approximately 10 or 10:30 at a package store in Morris, Connecticut buying an 8-pack of beer. (T.T. 1223) Margaret Brown, the next door neighbor of Mrs. McKitis, claims to have seen what she later identified as Stepney's blue pickup truck parked in back of the McKitis' home at approximately 9:30 a.m. (T.T. 36-37; 48-9) Edgar Bouffard, who resides on Route 63 at the intersection of Isaiah Smith Lane, claims to have seen Stepney drive by in his truck on May 9 sometime between 10:00 a.m.

and 12:00 noon heading south. (T.T. 1174-75) Ted Sparks says he saw a blue pickup truck parked by the porch of the McKitis' home sometime between 10:30 and 11:00 a.m. (T.T. 867-68) His daughter, Kimberly Sparks, claims to have observed a blue pickup truck leaving the McKitis home sometime between 11:15 and 11:30. (T.T. (900-901)

Several witnesses placed Mr. Stepney inside Sparks Convenience Market on May 9, 1979 between 10:30 and noon. Jane Sparks initially told the state police that Mr. Stepney had come into the store on May 8 and bought some beer. (T.T. 214; 1150) Later, Jane Sparks and her mother said that upon thinking about the events of May 9, they thought Stepney had come into the store on that day rather than the 8th of May. (T.T. 215; 1154-55) This recapitulation of the date was triggered by a

recollection that the Drake's Bakery man had made his delivery on the same day that they recall Stepney being in the store, that delivery having been made on May 9. (T.T. 197; 1147; 1159)

As previously noted, John Panilaitas testified that he and his work crew observed Stepney drive by on Isaiah Smith Lane between 11:45 a.m. and 12:00 noon. (T.T. 1130-31; 1140) Randy Richter, a boyfriend of Kimberly Sparks, claims that Kim commented to him on the presence of a blue pickup truck at the McKitis' home at about 12:20 p.m. (T.T. 892) Finally, Shirley Bouffard, daughter-in-law of Edgard Bouffard, claims to have seen Stepney between 3:00 and 4:00 p.m. on Route 109 half way between Isaiah Smith Lane and the center of Morris. (T.T. 1188; 1191)

4. VICTIM AND HER WHEREABOUTS

Barbara McKitis at the time of her death was 53 years old. She lived alone in

a one-family house on Route 209 in Bantam, Connecticut with her dog and cats. She was was in the process of getting a divorce. (T.T. 1046-47; 1052) A continuing "tag sale" had been going on at her home. (T.T. 1046-1047; 1882)

Mrs. McKitis had a history of alcoholic abuse and had been treated at Serenity Hills for alcoholism. (T.T. 65; 300) Bill Stepney's daughter, Lillian Lockwood, had recently moved into the house across the street from the McKitis' residence. (T.T. 1178; 1882)

On the day of her death, Mrs. McKitis was observed by her neighbor, Margaret Brown, at approximately 8:00 a.m. leaving her home in her vehicle, a red and black Mustang. (T.T. 36) She observed her return to her home at approximately 9:40. (T.T. 36; 88) (She claims to have seen a blue pickup truck in the McKitis yard at

that time as well.) (T.T. 36; 88) She did not see Mrs. McKitis alive again that day. (T.T. 36-38)

However, Mrs. Brown recalls that it was a very warm day (T.T. 55) and her windows adjacent to the McKitis' home were open. (T.T. 103; 109) She heard a crash coming from the McKitis' home at approximately 1:30 p.m. (T.T. 55) She was able to peg the time of the noise by a soap opera she was watching on television. (T.T. 110) The noise was sufficient to arouse her curiosity so that she looked over at the McKitis' home, saw nothing, went out on her front porch, saw nothing, went back and watched the rest of her television show. (T.T. 112)

5. TESTIMONY OF WILLIAM STEPNEY

William Stepney testified in his own behalf essentially as follows:

On May 9, 1979, he left his house at approximately 7:00 a.m. (T.T. 1902) He

drove down Isaiah Smith Lane to Route 63 and headed south towards Waterbury in his blue pickup truck. (T.T.1906) Bill drove to Oakville where he picked up his friend, George Pierce. (T.T. 1907-08) (T.T. 1908) The two arrived at Albert's Junkyard between 8:00 and 8:10 a.m. (T.T. 1910) He and Pierce then off loaded the scrap metal and were paid in cash the sum of $43.00. (T.T. 1911-12)

They then picked up a cast iron sink at Pierce's house, brought it to the junkyard and were paid for it. (T.T. 1079; 1912) After leaving Albert's, they purchased a 6-pack of Budweiser beer, and drank some waiting for a store to open. (T.T. 1913-15; 1102)

After Pierce left, and on his way home, Bill stopped at a market. (T.T. 1916) Around 9:45, as he drove down Isaiah Smith Lane, he stopped and spoke to John

Panilaitas and the other members of the town road crew and then continued home. (T.T. 1917)

Bill had been wearing a long sleeve shirt which he took off and replaced with a tanktop shirt. (T.T. 1919) He washed his arms down and applied calamine lotion to a severe case of poison ivy from which he was suffering. (T.T. 1888; 1892; 1919) His arms and legs had open running sores on them from the poison ivy. (T.T. 1888)

Bill told his wife he was going to the McKitis' home to give Mrs. McKitis the money he owed her. (T.T. 1920) He left his house in Morris sometime between 10:15 and 10:20 a.m. (T.T. 1921) and arrived at the McKitis' home at approximately 10:45 a.m. (T.T. 1925)

He pulled his truck into the McKitis' property and parked near the rear steps. (T.T. 1926) Prior to arriving at the McKitis' house, he had stopped at the

Southfarms Package Store and bought an 8-pack of beer. (T.T. 1928) He did so based on the belief that he was going to do more work at the McKitis' house and that he would drink the beer while he was there. (T.T. 1928)

As he pulled into the McKitis' property, Mrs. McKitis came out and he told her he brought her some money. (T.T. 1928-29) He asked if it would be all right to clean up the remainder of the material in the barn but she said no because she was going to her mother's house in Canaan. (T.T. 1929-30) Mrs. McKitis asked Bill if he would like to have a highball. (T.T. 1930) He said no but that he had beer in the truck and he would have one of those. (T.T. 1930-31) He brought two beers into the house, opened them, and Mrs. McKitis had one. (T.T. 1931) After taking a mouthful of beer, Mrs. McKitis said she was

going to make herself a highball. (T.T. 1932) She went to the refrigerator and got some soda water there. (T.T. 1932) Stepney poured a drink for her. (T.T. 1932-33)

The two stood chatting for a while about the move she was anticipating. (T.T. 1933) After staying at the McKitis' house approximately one-half hour, he said goodbye to her and left. (T.T. 1934) She was still alive when he left, standing at the rear door of her house. (T.T. 1934)

Upon leaving the McKitis' house, he stopped at the post office to see if he had any mail. (T.T. 1937) He arrived home shortly before noon and, while driving down Isaiah Smith Lane, observed the town road crew eating lunch. (T.T. 1939) He and his wife remained at their home throughout the afternoon. (T.T. 1803)

## 6. THE PHYSICAL EVIDENCE

The bedroom where Mrs. McKitis was found was in a state of terrible disarray. (T.T. 200) The seat of a piano bench had been raised off its hinges and was covered with blood and hair. (T.T. 707; 1391; 1587) A portable television set was found lying near the victim with a slash mark in its plastic case. (T.T. 562; 674) A wooden oxbow was in the vicinity. (T.T. 467) One of the wooden yokes from the oxbow was removed and was covered with blood. (T.T. 1392; 1432) A concrete brick with red stains was also removed from the bedroom, from an area on the floor by the victim, and to the right of her head. (T.T. 436) Blood was spattered all over the room, including the ceiling (T.T. 438) and walls. Significant quantities of blood were found on the floor and bed clothing.

A spot of blood was found on the threshold on the doorway leading from the

bedroom to the kitchen area. (T.T. 617) Spots of blood were found in the kitchen sink and traces of blood were found in the sink trap. (T.T. 1407-08) A smear of blood was found on the doorjamb leading from the bedroom. (T.T. 1489) All of the objects in the bedroom and the doorjamb were dusted for fingerprints. (T.T. 931-41)

Sixty-four latent fingerprints were found either on items of personal property or the doorcasings at the crime scene. (T.T. 926-27) Twelve of the sixty-four were identified as belonging to the victim, Barbara McKitis. (T.T. 927) Thirty-four of the latent prints were determined to be unidentifiable, that is to say they were not good enough to identify them with anyone. (T.T. 927) That left eighteen prints that were neither identified nor eliminated. (T.T. 928) Of these, five

were partial palm prints and thirteen fingerprints from the crime scene that were of sufficient quality to be identifiable. (T.T. 928)

Fingerprints and palm prints were taken of William Stepney. (T.T. 928) None of the identifiable fingerprints or palm prints were his. (T.T. 928)

The blood of the victim, Barbara McKitis, was determined by the State Toxicological Lab to be type AB, RH Negative. (T.T. 1385; 1521) It was also tested under the MN System and determined to be M positive, N Negative. (T.T. 1521)

The blood of William Stepney was determined to be type B. (T.T. 2071) On May 9, 1979, William Stepney was suffering from a severe case of poison ivy which covered his arms and legs. (T.T. 1887-88) He had developed running bleeding sores from scratching the poison ivy. (T.T. 1888) When questioned by the police offi-

cers, they observed this poison ivy condition on his arms and observed that it appeared to be bleeding from recent scratching. (T.T. 207-8) He was treating this rash with caladryl lotion. (T.T. 1892)

Of the clothing seized from the Stepney home, a pair of green work pants showed traces of blood stain on both trouser legs. (T.T. 1505-1511; 2068) They were only on the inner portion of the trousers and did not go all the way through the cloth to the outer portion. (T.T. 1412) Dr. Henry Lee conceded in cross examination that he observed something else besides blood in his examination, was surprised by it, but went no further to try to determine what it was. (T.T. 1506-7) These speckled blood stains were identified as being AB blood. (T.T. 1412; 1508-9)

A pair of canvas rubber soled shoes were taken from the Stepney home. One of the shoes was determined to have a minute blood stain on the inner aspect of the sole and on a portion of the canvas upper. (T.T. 1412; 1556-57) This blood was determined to be type AB. (T.T. 1411)

The steering wheel from the pickup truck was removed from the truck. (T.T. 1721) A trace of AB blood was found on the center portion of the steering wheel and on the rim. (T.T. 1419-20; 1577-78) Minute particles which appeared to be human blood were found in the vacuum sweepings from the Stepney truck. (T.T. 1421-22; 1583-84) These particles assumed a peculiar concave shape like scabs. (T.T. 2088-89)

Dr. Robert Shaler of the New York Medical Examiner's Office, an expert in blood stains and other excretions from the human body, testified that he conducted

examinations of the clothing and steering wheel taken from Mr. Stepney. (T.T. 2044-49; 2065;2096) He verified the speckled blood spatterings on the inner legs of Mr. Stepney's trousers. (T.T. 2066) He too was puzzled by the fact that the blood did not penetrate through the cloth (T.T. 2068; 2129-30) and that there was an additional substance clinging to the blood stains. (T.T. 2066) He conducted experiments with whole and dried samples of Mr. Stepney's blood and calamine lotion. (T.T. 2078; 2081) The resulting admixture of calamine with Mr. Stepney's type B blood led him to the conclusion that the blood stains observed by Dr. Lee as AB were in fact Mr. Stepney's own blood, contaminated by the calamine lotion. (T.T. 2078; 2081)

Shaler further examined the chips of blood-like materials from the floor of the Stepney truck. (T.T. 2087) He concluded

that because of the peculiar concave shape of these specks, they were scabs that had come off the poison ivy sores on Mr. Stepney's body. (T.T. 2087-9)

The 8 ounce Budweiser beer can found at the crime scene under the victim's body was dusted for fingerprints. None were found. The can itself appeared to have a rust stain on its upper surface and was of uncertain age. No tests were conducted to determine its age.

REASONS FOR GRANTING THE WRIT

This case draws into question the constitutionality of several rulings by the Connecticut Supreme Court as opposed to the conduct of the investigative authorities. At the heart of this petition is disagreement with the holding of the Connecticut Supreme Court that a pre-arrest statement by an accused, that he wants to stop answering questions and consult with an

attorney, together with his demeanor while invoking such right, is admissible against him through the investigating officer during the state's case in chief. This judicial holding[2] violates the petitioner's Fifth Amendment right to remain silent and shifts the burden to him to explain why he wanted to stop answering questions and speak to a lawyer.

Petitioner also questions the constitutionality of the jury charge which focuses on his interest in the outcome of his trial. Even though such a charge has been upheld numerous times by the

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[2] Throughout the trial and before the Connecticut Supreme Court, petitioner stated that he was not claiming that his constitutional rights had been violated by the police. He reiterates that assertion herein. His claim at the trial was merely an evidentiary claim as to the admissibility of his statement. However, the ruling by the trial court admitting the statement and the holding of the Connecticut Supreme Court raises the issue to one of constitutional dimension.

Connecticut Supreme Court, it is at variance with decisions of several other states, and one of the federal circuits. It contradicts several decisions of this Court. Further, by permitting an additional charge which singled out the credibility of the petitioner's wife, the Connecticut court compounded the violation of petitioner's due process rights.

I. A JUDICIAL HOLDING THAT A PRE-ARREST STATEMENT BY AN ACCUSED THAT HE WANTS TO STOP ANSWERING QUESTIONS AND CONSULT WITH AN ATTORNEY, TOGETHER WITH A DESCRIPTION OF HIS DEMEANOR WHILE MAKING SUCH STATEMENT, CONSTITUTES AN ADMISSION WHICH IS ADMISSIBLE AGAINST THAT ACCUSED AT HIS SUBSEQUENT TRIAL, VIOLATES PETITIONER'S FIFTH AMENDMENT RIGHTS.

During the course of a pre-arrest noncustodial interrogation[3] by a Connect-

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[3] Petitioner was not given a Miranda warning since the police said he was not a suspect but merely a witness and was not in custody. Petitioner did not challenge the police action on constitutional grounds but objected to the admissibility of the statements on the ground that they were hearsay, exculpatory and not inconsistent with his plea of not guilty.

icut state police officer, petitioner answered a number of questions about his whereabouts on the day of the murder. He acknowledged that he had been with the victim at her house on the morning of the killing, but consistently denied his guilt. When the questioning became sharper and more accusatory, the police officer testified, over objection, that the following occurred:

> A. [Trooper Cavanaugh]
>
> I asked him again to recall where the -- where he had left the beer can and, again, he said he didn't know, and I just said to him, "What would you say if I told you that there was an eight-ounce beer can found next to the victim's body?" And Mr. Stepney said to me, "Well, after she had finished her drink, she wanted a beer, so I went out to my truck and I got her a can of beer," and I said something to the effect, "Well, that doesn't make sense to me, that what I know about the victim, she was a liquor drinker and seeing as she had a bottle of liquor there, why would she want a beer?" And at that point Mr. Stepney got very

> mad and very upset and jumped up and said he wanted a lawyer and didn't want to talk to me any more, and he left the room. (Emphasis added.)

Petitioner objected at the trial court level, in his appeal brief (p. 56-57), in oral argument to the Connecticut Supreme Court, and in his motion to reargue, that the invocation of a constitutional right could in no way be deemed to be an admission[4] by the petitioner and therefore admissible as an exception to the hearsay rule. The demand to stop questioning and the manner in which it was made became

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[4] The petitioner's objection to the invocation of his constitutional right to remain silent and for consultation with an attorney does not even appear in the Connecticut Supreme Court opinion since the court chose to ignore the claim altogether and focus entirely upon the issue of admissions. In holding that petitioner's statements were admissions, the court took the unusual step of overruling prior Connecticut law. See State v. Villafane, 171 Conn. 644, 674, 372 A.2d 82 (1976), cert. denied, 429 U.S. 1106 (1977), on which petitioner had relied.

particularly prejudicial in the context in which it was presented.

It is clear that a prosecutor cannot cross-examine an accused's post arrest silence after he has been warned of his constitutional right to remain silent. Doyle v. Ohio, 426 U.S. 610, 618 (1976). It is equally clear that neither the court nor a prosecutor can comment on the failure of an accused to testify at his own trial on the ground that such a comment "[c]uts down on the [constitutional] privilege by making its assertion costly." Griffin v. California, 380 U.S. 609, 614, reh. denied, 381 U.S. 957 (1965).[5] In the cases

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[5] Connecticut has adopted the Griffin rule, State v. Annuziato, 169 Conn. 517, 531, 363 A.2d 1011 (1975), however, not without qualification by holding that an argument or charge on the defendant's silence is permissible "So long as neither the argument of counsel nor the charge to the jury would naturally and necessarily direct the jury's attention to the failure to testify." State v. Daniels, 180 Conn. 101, 109, 429 A.2d 813 (1980).

where pre-arrest silence has been used to impeach an accused, it has been in the context of cross-examination, Jenkins v. Anderson, 447 U.S. 231 (1980); Anderson v. Charles, 447 U.S. 404, reh. denied, 448 U.S. 912 (1980), not during the state's case in chief before the accused has elected to testify.[6]

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[6] In a rather unusual argument, the Connecticut court reasoned that because the accused has a right to remain silent, he could prevent the admission of extra-judicial statements which were not tantamount to a full confession of guilt by the expedient of not testifying. The court goes on to say that the prosecution therefore must put the statements in during its case in chief rather than run the risk that the defendant will assert his constitutional right to remain silent. The court seems to confuse a constitutional right with a mere trial stragem. State v. Stepney, 191 Conn. 233 (1983) at 253. (App. 21A)

Here the petitioner had both a Fifth Amendment right to remain silent and Sixth Amendment right to counsel. This Court has consistently held that one constitutional right should not have to be surrendered in order to assert another one. Simmons v. United States, 390 U.S. 377, 394 (1968). If the holding of the Connecticut Supreme Court is allowed to stand, an accused who has been given his Miranda warning faces a dilemma. If he says nothing at all, and later testifies in his own behalf, his silence may be used on cross-examination for impeachment purposes. On the other hand, if he says, "I do not want to answer questions and I want to speak to a lawyer," that statement can be used against him

during the state's case in chief[7] as substantive evidence of guilt and not merely as impeachment. Such an anomaly cannot be allowed to stand.

In the present case, the petitioner had not been warned of his rights, was not in custody, was free to leave when he wanted to (as he did), and was free to remain silent and consult with a lawyer. When he told the officer that he wanted to do just that, he found at his trial that his invocation of his constitutional rights was used against him. This Court has held in a number of cases that constitutional violations may arise from a deterrent or "chilling" effect of governmental action that falls short of a direct prohibition

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[7] Petitioner makes no claim as to the use of his statement on cross-examination if he chooses to take the witness stand, since its use would have have to be read in the context of his own testimony and the prosecutor's examination.

against the exercise of a constitutional right.[8] The holding by the Connecticut court has precisely that chilling effect. The petition for a writ of certiorari should be granted.

II. THE JURY CHARGES ON THE CREDIBILITY OF THE PETITIONER AND HIS WIFE UNFAIRLY FOCUSED ON THEM TO THE EXCLUSION OF ALL OTHER WITNESSES, INVADED THE PROVINCE OF THE JURY, AND DESTROYED THE PERFECT IMPARTIALITY OF THE COURT, ALL IN VIOLATION OF PETITIONER'S FOURTEENTH AMENDMENT RIGHTS.

During the course of its instructions, the court advised the jury in part as follows:

> It is the province of the Jury to determine the credibility, if any, to be given the testimony

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[8] See, e.g., Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Lamont v. Postmaster General, 381 U.S. 301 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964).

> of a witness who has been impeached. Evidence was offered in this case, as I remember it and, of course, this is for you to recall. Your recollection is controlling. I think there was evidence of statements, for example, by Mrs. Stepney which you may believe to have been inconsistent with her testimony. You heard the evidence and you heard her explanation as to some of it, anyway.

(T.T. 2206) (emphasis added) (See more complete excerpt in Appendix, pp. 14A-17A)

In its charge, the court chose to focus only on the testimony of Lillian Stepney. A total of 49 witnesses testified; 39 called by the state and 10 by the defendant. Inconsistencies between the trial testimony of numerous of these witnesses versus the pretrial statements they had given to investigators were presented to the jury through the cross-examination process. Lillian Stepney was a crucial defense witness who helped estab-

lish the whereabouts of the defendant during the time period when the state claimed the crime was committed. In the context of the entire charge on credibility, Lillian Stepney's testimony and indeed her motivation were highlighted for the jury's particular attention.

This charge was closely followed by the following instruction:

> In this case, the accused took the witness stand. He had a right to do so, and in weighing the testimony of an accused person you should apply the same principles by which the testimony of other witnesses is tested. An accused person, having taken the witness stand, stands before you just like any other witness and is entitled to the same consideration and must have his testimony weighed in the same way as any other witness, <u>including his interest in the verdict which you are about to render</u>. (Emphasis added)

(T.T. 2211)

The juxtaposition of these two instructions demonstrates how the emphasis that the court gives to a particular aspect of a case can subtly color the jurors' way of viewing the entire case. The credibility of witnesses should properly be a matter that the jury approaches with balance regardless of the side calling the particular witness. In the present case, the only two people singled out for particularized attention were the petitioner and his wife. Each was critical in his or her own way to the defense. By singling them out, to the exclusion of all other witnesses, the court made their credibility a matter of singular concern. In doing so, the court in effect said that their testimony should be subject to special scrutiny and a special set of rules. For this reason, this Court should

grant the petition for certiorari and review these critical issues.

A. THE COURT SHOULD NOT HAVE FOCUSED ON THE TESTIMONY OF PETITIONER'S WIFE, LILLIAN STEPNEY

While it is true that the extent to which the court can comment on the evidence to the jury is largely a matter within its sound discretion, State v. Wilkinson, 176 Conn. 451, 463, 408 A.2d 232 (1979), that discretion should comport with minimal due process standards. Balance is the touchstone that should guide the court in deciding the extent to which it comments at all on the evidence. United States v. Gleason, 616 F.2d 2, 15 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980).

The reason for such a limitation on both the quantity and quality of the court's comments on the credibility of certain witnesses is that he runs the risk of abdicating his role of "Perfect impar-

tiality," Glasser v. United States, 315 U1.S. 60, 82 (1941) and instead "taking an apparent position of advocacy in a case before him," a position which has been continually condemned. State v. Echols, 170 Conn. 11, 14, 364 A.2d 225 (1975); LaChase v. Sanders, 142 Conn. 122, 124-25, 111 A.2d 690 (1955). "The court must refrain, however, from making improper remarks which are indicative of favor or condemnation, or which disparage a defendant before the jury." State v. Echols, 170 Conn. at 14.

In the present case, Lillian Stepney was the petitioner's key alibi witness. During the voir dire examination, extensive questioning was made of the prospective jurors as to whether they might tend to disbelieve the defendant's wife just because she was his wife. She was an elderly, nervous person who was subjected

to extensive cross-examination by the state's attorney. To focus on her testimony during the charge on credibility and to point to possible inconsistent statements she might have made prior to the trial, when virtually every lay and police witness made similar inconsistent statements, was to venture beyond that balance that the court must meet. This is particularly true in light of the charge given shortly thereafter on the weight to be attached to the petitioner's testimony for the reasons that follow.

Numerous jurisdictions have held that singling out an alibi witness, particularly a wife, for special comment is reversible error. Thus in State v. Boyd, 196 Iowa 226, 228, (1923), the challenged instruction was: "Testimony tending to establish an alibi, being usually from members of the defendant's family and easily manufactured,

should be closely scrutinized and carefully considered." The court held this charge to be erroneous, commenting: "The instruction tended to single out the testimony of appellant's wife for particular scrutiny and to cast some suspicion upon it." See also People v. McCoy, 392 Mich. 231, 239 (1974), where the court condemned the lack of a balanced approach by the trial court because of an instruction which focused entirely on the defendant's alibi witness.

Rhode Island has criticized an instruction singling out and denigrating an individual witness or conveying an impression about that witness' credibility. State v. Bruyere, 110 R.I. 426, 293 A.2d 311, 312 (1972); State v. Goff, 107 R.I. 331, 267 A.2d 686 (1970); State v. Hull, 106 R.I. 275, 258 A.2d 793 (1969). Indiana has held that the court should not "Single out any special witness and burden his

testimony with any suggestion which might indicate to the jury that in the opinion of the court such witness was liable to testify falsely." Evans v. State, 300 N.E. 2d 882, 886 (Ind. 1973) quoting Cherry v. State, 280 N.E. 2d 818, 820 (Ind. 1972). See also Turner v. State, 280 N.E.2d 621, 624 (Ind. 1972). Other states which have criticized charges which single out a particular witness are California, People v. Pierson, 69 C.A.2d 285, 293, 159 P.2d 39 (1945); People v. Costello, 21 C.2d 760, 763 (1943) and Wisconsin, Johnson v. State, 75 Wis. 2d 344, 249 N.W.2d 593, 605 (1977); Koss v. State, 217 Wis. 325, 333, 258 N.W. 860 (1935).

In the present case, the court's comments about Lillian Stepney were needless in the context of the charge on credibility. She became the only witness whose testimony was called into question,

when indeed several witnesses were subject to impeachment. Moreover, the court cast particular doubt on her testimony by saying, "You heard the evidence and you heard her explanation as to some of it, anyway..." (emphasis added) This focus upon her, when coupled with the focus placed upon the petitioner himself, had the subtle effect of telling the jury that two key defense witnesses were not worthy of belief. Contrary to the ruling of the Connecticut Supreme Court that this instruction was "scrupulously fair and balanced" (191 Conn. at 248-9), this charge not only focused on Lillian Stepney to the exclusion of all of the witnesses, but then added the editorial comment that she had explained her inconsistencies, "as to some of it anyway." Fundamental fairness should not permit such judicial intervention to go unchallenged.

B. THE COURT SHOULD NOT HAVE FOCUSED ON THE TESTIMONY OF THE PETITIONER.

Within seconds of having singled out Lillian Stepney by name, the trial court turned to the credibility of the petitioner as a witness and told the jury that as a matter of law they could consider the petitioner's interest in the outcome of the case in assessing the credibility to be afforded his testimony. Thus the only defense witnesses who testified on the petitioner's alibi were made the objects of special attention by the court. The jury was told that their testimony should not be treated the same as that of other witnesses, but was somehow special.

A clear conflict exists among the decisions of the various circuits and the highest courts of several states as to the treatment to be accorded by the jury to the

testimony of a defendant who testifies on his own behalf.[9] This Court has consistently held that the testimony of a defendant witness is to be accorded the same weight as that of any other witness. However, no decision touching on this subject has been issued by this Court since 1933.[10] In the interim, a conflicting body of law has developed as to how the testimony of a defendant/witness is to be treated by the jury.

Although the presumption of innocence is not specifically mentioned in the

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[9] The Connecticut Supreme Court dismissed this claim as being "utterly without merit" in a footnote (191 Conn. at 24[illegible]). This disdain for the issue indicates that what is a significant legal issue throughout the United States has now been foreclosed in Connecticut. Therefore, the issue must be resolved by this Court or the petitioner will be without a judicial remedy.

[10] Quercia v. United States, 289 U.S. 466 (1933).

Constitution, this Court has said that it is "the undoubted law, axiomatic and elementary and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895). The presumption of innocence ranks among the "safeguards of a fair procedure" that have been accorded constitutional status. Deutch v. United States, 367 U.S. 456, 471 (1961).

Inherent in the presumption of innocence is the concept that the accused stands before the jury on an equal footing with any other person, entitled to no consideration, either favorable or unfavorable, different from that any other person merits. Swanson v. State, 222 Ind. 217, 52 N.E.2d 616, 617-18 (1944). To hold otherwise is to make a mockery of the presumption. Either the accused has equality before the jury or he does not. If he does

not, then he is not presumed to be innocent but rather he is presumed to be something else which requires the jury to pay special attention to what he has to say.

In Hicks v. United States, 150 U.S. 442 (1893), this Court held that an instruction which said that the jury should consider the interest the defendant had in the result of the case was erroneous and refused to speculate as to what effect it might have had on the jury. In Allison v. United States, 160 U.S. 203, 207 (1895), the Court, relying on Hicks, again said it was for the jury to test the credibility of the defendant, uninfluenced by an instruction which might strip him of his competency as a witness. Then in Wilson v. United States, 162 U.S. 613, 621 (1896), the Court, referring once again to Hicks, and Allison, upheld a conviction because the trial court specifically did not charge

the jury to treat the defendant's testimony in a manner different from the other witnesses.

Finally, in Quercia v. United States, 289 U.S. 466, 471 (1933), this Court reaffirmed the rule from Allison that the weight to be given the defendant's testimony lies within the exclusive province of the jury "uninfluenced by instructions which might operate to strip him of [his] competency." This Court has not ruled on the subject of the weight to be given the testimony of a defendant witness since Quercia. As a result, there is a direct division among the circuits as to how to treat such testimony.

The Second Circuit Court of Appeals has upheld a charge calling attention to the defendant's interest in the case[11] but

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[11] United States v. Martin, 525 F.2d 703, 706-7, n.3 (3d Cir.), cert. denied, 423 U.S. 1035 (1975).

has done so gingerly pointing out that a balancing charge to the effect that such interest is not inconsistent with the defendant's ability to tell the truth is preferable.[12]

The Eighth Circuit, however, has condemned the use of a charge calling the jury's attention to any interest the defendant might have in the outcome of the case. In a series of cases, the Eighth Circuit first warned the District Courts it "preferred" that the defendant not be singled out,[13] then said that the continued

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[12] United States v. Schlesinger, 598 F.2d 722, 727 (2d Cir.), cert. denied, 444 U.S. 880 (1979); United States v. Hernandez, 588 F.2d 346, 349 (2d Cir. 1978); United States v. Rucker, 586 F.2d 899, 904 (2d Cir. 1978); United States v. Floyd, 555 F.2d 45, 47, n.4 (2d Cir.), cert. denied, 434 U.S. 851 (1977).

[13] United States v. Brown, 453 F.2d 101, 107 (8th Cir.), cert. denied, 405 U.S. 978 (1972).

use of such a charge could cause the court to rule per se that it is erroneous,[14] and finally that such a charge should not be used "especially in a case where much depends upon the defendant's credibility."[15] In the present case, the petitioner's credibility was directly on the line since what he testified to related to his own alibi or was in direct conflict with the state police witnesses.

A similar conflict exists among the state courts on this type of charge. As a result of the line of cases in the Eighth Circuit cited above, Minnesota[16] joined

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[14] United States v. Bear Killer, 534 F.2d 1253, 1260 (8th Cir.), cert. denied, 429 U.S. 846 (1976).

[15] United States v. Standing Solider, 538 F.2d 196, 204 (8th Cir.), cert. denied, 429 U.S. 1025 (1976).

[16] State v. Underwood, 281 N.W.2d 337 (Minn. 1979)

Indiana,[17] Mississippi,[17] Missouri[19] and Iowa[20] in overturning convictions because a charge singling out the defendant was utilized.[21] On the other hand, the Connecticut Supreme Court has consistently upheld a charge singling out the defen-

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[17] Garvin v. State, 263 N.E.2d 371 (Ind. 1970); Barnett v. State, 240 Ind. 129, 161 N.E.2d 444 (1959); Alder v. State, 239 Ind. 68, 154 N.E.2d 716 (1958).

[18] Hall v. State, 250 Miss. 253, 165 So.2d 345 (1964)

[19] State v. Finkelstein, 269 Mo. 612, 191 S.W. 1002 (1917)

[20] Iowa v. Bester, 167 N.W. 2d 705 (Iowa 1969); State v. Allnutt, 156 N.W.2d 266 (Iowa 1968); State v. Gibson, 228 Iowa 748, 292 N.W. 786 (1940).

[21] See also Annot., 85 A.L.R. 523, 577 (1933) noting such a charge to be prejudicially erroneous in Arizona, California, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Nevada, Oklahoma, South Carolina and Texas.

dant[22] although in a recent pronouncement,[23] the court reluctantly upheld the charge saying:

> This is not to say that at some future time this court, especially in the case of a material violation of the language used here, might not reca sider the question of whether such a reference in the charge amounts to a violation of the defendant's due process rights either under the state or federal constitution.

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22 State v. Roos,, 188 Conn. 644, 645, 452 A.2d 1163 (1982); State v. Avcollie, 188 Conn. 626, 637, 453 A.2d 418 (1982), cert. denied, 51 U.S.L.W. 3821 (1983); State v. Schleifer, 102 Conn. 708, 130 A. 184 (1925); State v. Palko, 122 Conn. 529, 191 A. 320, aff'd, 302 U.S. 319 (1937); State v. Guthridge, 164 Conn. 145, 318 A.2d 87 (1972), cert. denied, 410 U.S. 988 (1973); State v. Bennett, 172 Conn. 324, 374 A.2d 247 (1977) (Bogdanski, J. dissenting on this issue); State v. Jonas, 169 Conn. 566, 363 A.2d 1378 (1975), cert. denied, 424 U.S. 923 (1976) (Bogdanski, J. dissenting on this issue); State v. Mastropetre, 175 Conn. 512, 400 A.2d 276 (1978) (Bogdanski, J. dissenting on this issue).

23 State v. Kurvin, 186 Conn. 555, 570, n.3, 442 A.2d 1327 (1982), although that time now seems to be postponed until never, see note 9, supra.

From the foregoing review of the state and federal case law, it is apparent that a substantial body of conflicting case law exists on the treatment to be accorded a defendant's testimony. In the present case, which involves very complicated circumstantial evidence, the petitioner, an elderly, ill man who had led a crime free life, was entitled to have his testimony go to the jury unfettered by a charge that it should consider his interest in the outcome of the case in weighing what credence, if any, to give him. This case presents an issue of substantial constitutional importance which needs clarification for the courts throughout the country.

III. IN THE CONTEXT OF THIS CASE, TWO JURY CHARGES FOCUSING ON THE CREDIBILITY OF THE PETITIONER AND HIS WIFE DENIED THE PETITIONER DUE PROCESS OF LAW.

Read together, the jury charges regarding the credibility of the petitioner and his wife effectively told the jury that

their testimony was to be given special scrutiny. The testimony of these two witnesses constituted the heart of the petitioner's case. Even if this Court were to deny certiorari in so far as either charge is concerned, cumulatively they raise an issue of such significant constitutional magnitude as to warrant review.

In reviewing a claim of error, one cannot strip and isolate the claim of error from the entire case. In other words, the court must view each claim of error in the context of the entire record and all of the claims of error made. Kotteakos v. United States, 328 U.S. 750, 763-64 (1946). In keeping with this principle it was held in Getchell v. United States, 282 F.2d 681, 691 (5th Cir. 1960) that,

> Whether or not the failure to rule on that objection was error calling for reversal, or any one of the foregoing

> occurrences would, by itself, be plain error, the cumulative effect of all of them makes it all too probable that the jury's verdict was brought about, not by the weight of the evidence, but by the foregoing and other appeals to sympathy, prejudice and passion which the district court left unreproved.

A similar result was reached in Marcus v. United States, 422 F.2d 752, 753 (5th Cir. 1970):

> We hold that the cumulative effect of the District Court's errors, which are discussed in detail below, when taken together, require that this case be reversed and remanded to the District Court for a new trial, even though no single error, when viewed in isolation, would necessarily require this disposition.

The Kotteakos test was recently applied in United States v. Nyman, 649 F.2d 208, 211-12 (4th Cir. 1980), wherein the court said:

> ... we draw upon the helpful refinement suggested in Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969): "[t]he decisive factors [in applying the Kotteakos standard] are the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." Id. at 1079.

See also United States v. Ible, 630 F.2d 389, 397 (5th Cir. 1980).

In the present case the issue of guilt or innocence was clearly a close one. The state's case consisted entirely of circumstantial and forensic evidence. The credibility of the petitioner and his wife were central to their defense.[24] These two elderly, unsophisticated people were

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[24] Ironically, in denying petitioners claim that the verdict was not supported by the evidence, the Connecticut Supreme Court said "We do not sit as a thirteenth juror.... We have not had the jury's opportunity to observe the conduct demeanor, and attitude of witnesses and to judge their credibility." (191 Conn. at 255). That is precisely the point petitioner is claiming and the reason why the credibility of petitioner and his wife was crucial.

matched against a parade of police, scientific and medical experts. Their believeability was the primary line of defense. Nothing was done to mitigate the error, notwithstanding the exception taken to the court's charge.

Petitioner does not claim that the two charges complained of are each harmless error. Standing alone each raises substantial due process issues, each of which would warrant reversal. In the alternative petitioner urges that whether or not either warrants review, collectively they require it.

## CONCLUSION

FOR THESE REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF CONNECTICUT.

Respectfully submitted,

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Counsel for Petitioner

With whom on the petition was Sally S. King

December , 1983

# In The
# Supreme Court Of The United States

OCTOBER TERM, 1983

No._____

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**WILLIAM H. STEPNEY, JR.,**
*Petitioner,*

v.

**STATE OF CONNECTICUT,**
*Respondent.*

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**APPENDIX**

OPINION OF THE SUPREME COURT

OF THE

STATE OF CONNECTICUT

## STATE OF CONNECTICUT *v.* WILLIAM H. STEPNEY, JR. (10574)

SPEZIALE, C. J., PETERS, HEALEY, PARSKEY and SHEA, Js.

Convicted following a jury trial of the crime of murder, the defendant appealed. *Held:*

1. The trial court correctly denied the defendant's motion to suppress certain evidence which had been seized from him pursuant to a search warrant which, he claimed, was issued on the basis of an affidavit containing deliberately false statements by a police officer; that court's finding that the defendant had failed to show that the affiant officer, when he made the challenged statements, did so with reckless disregard of the truth or with intent to mislead the judge, was not clearly erroneous.

2. The trial court did not err in denying the defendant's motion for a further bill of particulars in which he sought a more specific statement than that contained in the state's first bill of particulars with respect to the time of day at which the alleged offense occurred; it was apparent that the state was not able to determine the precise time of the victim's death.
3. The trial court did not err in refusing to allow the defendant to introduce through an expert witness certain evidence as to blood stains on two pairs of trousers which the defendant alleged belonged to him; that court could reasonably have concluded that the defendant had failed to lay a sufficient foundation for the admission of the proffered evidence.
4. The trial court did not, in its charge on the credibility of witnesses, err in making an illustrative comment to the jury to the effect that there may have been inconsistencies between the testimony of the defendant's wife at trial and statements she had made prior to trial.
5. The trial court did not err in admitting into evidence under the admissions exception to the hearsay rule testimony by police officers as to statements made by the defendant on the day of the alleged offense, his claim that the statements did not constitute admissions because they were exculpatory and thus consistent with his plea of not guilty notwithstanding; voluntary extrajudicial admissions in criminal cases need not be shown to be inconsistent with a position taken by a defendant at trial, and, to the extent that the decision in *State* v. *Villafane* (171 Conn. 644) holds otherwise, it is overruled.
6. The evidence presented at trial and the inferences which the jury could reasonably have drawn therefrom was sufficient to establish the defendant's guilt beyond a reasonable doubt.

Argued May 11—decision released August 30, 1983

Indictment charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before *Stoughton, J.*; verdict and judgment of guilty and appeal by the defendant to this court. *No error.*

*James A. Wade*, with whom was *Sally S. King*, for the appellant (defendant).

*Carl J. Schuman*, assistant state's attorney, with whom was *Anne C. Dranginis*, assistant state's attorney, and, on the brief, *Dennis A. Santore*, state's attorney, for the appellee (state).

SPEZIALE, C. J. The defendant, William H. Stepney, Jr., was indicted by a grand jury for the crime of murder in violation of General Statutes § 53a-54a.[1] A trial before a jury of twelve commenced in October of 1980. Just prior to trial, the defendant filed a motion to suppress evidence which was denied by the trial court. Following fifteen days of testimony and deliberation for two days, the jury returned a verdict of guilty. From the judgment rendered on that verdict the defendant has appealed to this court.

On appeal the defendant claims that the trial court erred in: (1) the denial of his motion to suppress evidence seized pursuant to an allegedly invalid warrant; (2) the denial of his motion for a second bill of particulars; (3) the exclusion from evidence of certain items of clothing upon which his expert had conducted out-of-court tests; (4) the charge to the jury concerning the credibility of witnesses; (5) the admission of testimony by police officers concerning hearsay declarations by the defendant; and (6) the denial of his motion for judgment of acquittal based on the insufficiency of the evidence. We find no error.

The jury reasonably could have found the following facts: On May 9, 1979, at approximately 3:45 p.m., the body of Mrs. Barbara McKitis was discovered in the bedroom of her home in Bantam. The victim had been severely beaten with a blunt object, possibly a blood-stained brick found near the body. There were five "chop" wounds on her skull, consistent with the use of an axe or hatchet. Multiple stab wounds and slash wounds were found on her head, neck, and legs. One

[1] Following the indictment, but before trial, the trial court reserved to this court the question of whether the charge on intent to the grand jury complied with due process. We found the charge to be without error in *State* v. *Stepney*, 181 Conn. 268, 435 A.2d 701 (1980), cert. denied, 449 U.S. 1077, 101 S. Ct. 856, 66 L. Ed. 2d 799 (1981).

of the stab wounds in her neck had severed the vertebral artery. There was a penetration wound to the victim's genitalia, which had been made before death.

The body was lying on its left side on the floor of the bedroom near the bed. The victim's dungarees were pulled down around the ankles and her panties were around her knees. Blood was spattered on the bed, the carpet, the walls, and on other objects throughout the bedroom, which was in extreme disarray. A butcher knife was found under the body and an eight ounce Budweiser beer can was lying approximately eighteen inches away. The medical examiner estimated that death had occurred "closer to the morning hours than to the afternoon."

The defendant had met the victim on May 3, 1979, six days before the murder, in connection with an ongoing tag sale of furniture and household goods she was holding following a separation from her husband. The defendant returned to the victim's house with his wife and daughter on May 5 and May 7 to buy a few items. He also arranged to help her clear some scrap metal out of her garage to sell to a junk dealer. On May 8, the defendant spent most of the day at the victim's house, during which time he filled his truck with scrap metal. He drove the fully loaded truck to his home in Morris that evening. Early the next day, the day of the murder, the defendant drove the truckload of scrap metal to a junkyard in Waterbury, returning home between 9:30 and 10 a.m. When the defendant told his wife that he was going to the victim's house to split the money from the sale of the scrap with her and to pick up another load, Mrs. Stepney became annoyed and a quarrel ensued. The defendant left home in his truck some time after 10 a.m. Between 10 and 10:30 a.m. he bought an eight pack of eight ounce Budweiser beer in Morris, and between 10 and 11 a.m. he bought

another eight pack in Bantam. His truck was seen parked in the victim's backyard sometime between 10:30 and 11 a.m. The defendant's truck left the victim's house between 11:15 and 11:30 a.m. and arrived at the defendant's house between 11:45 a.m. and noon.

The defendant's own testimony was that he arrived in his truck at the victim's house on May 9, the day of the murder, at about 10:45 a.m. He drank one of the eight ounce cans of beer and gave another to the victim. He stated that he and the victim talked together for thirty minutes or so, and that he mixed the victim a highball during that time. He arrived back at his own home at about noon.

The victim's blood was type AB, Rh negative. The defendant's blood was type B, Rh positive. Bloodstains which tested as AB negative were discovered on the inside of a pair of green workpants seized from the defendant, on the sole of a canvas shoe belonging to the defendant, and on the steering wheel of the defendant's truck.

## I

## The Search Warrant Affidavit

The defendant's first claim is that the trial court erred when it denied his motion to suppress certain items of evidence seized from the defendant pursuant to a search warrant. He asserts that the search warrant for these items was based upon an affidavit that contained deliberate false statements which if removed would render the affidavit insufficient to establish probable cause for a search warrant to issue. We disagree.

In *Franks* v. *Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) the United States Supreme Court held that "where the defendant makes

a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Although the court in *Franks* mentioned only "false statements . . . included . . . in the warrant affidavit," material omissions from such an affidavit also fall within the rule if the defendant proves that the omissions were knowingly and intentionally made, or were made with reckless disregard for the accuracy of the affidavit. *United States* v. *Martin*, 615 F.2d 318, 328 (5th Cir. 1980).

In this case, the defendant's challenge to the accuracy of the search warrant affidavit was made as part of a motion to suppress which also included several other claims not relevant to this appeal. The defendant claims that information presented in two paragraphs of the search warrant affidavit of Troopers James M. Cavanaugh and James Daloisio contained deliberate falsehoods concerning statements made by the defendant at two interviews conducted on May 9, one at the defendant's home at 5:30 p.m. and another at the police barracks at 8:30 p.m. The defendant's brief is vague about precisely what statements or omissions he considers to have been false. The only clear assertion is that a paragraph, relating to the first interview, con-

tains the defendant's statement that he arrived home from the victim's house at 10:30 to 10:45 a.m., whereas that statement was made only during the second interview. Daloisio admitted at the hearing on the motion to suppress[2] that the statement was not made at the .30 p.m. interview, but rather at the 8:30 p.m. interview. It is not enough, however, for the defendant to show an error in an affidavit. The error must be shown by a preponderance of the evidence to have been "knowingly and intentionally" false or made "with reckless disregard for the truth." *Franks* v. *Delaware*, supra, 155. "Allegations of negligence or innocent mistake are insufficient" to require a reevaluation of the affidavit. Id., 171. The trial court in this case found that "[t]here was no showing of any intent on the part of Daloisio to intentionally mislead the judge, or that he acted with reckless disregard for the truth." We may reject this finding only if it is clearly erroneous. Practice Book § 3060D. Nothing before us indicates that the finding is "unsupported by the record, incorrect or otherwise mistaken"; *Kaplan* v. *Kaplan*, 186 Conn. 387, 391, 441 A.2d 629 (1982); and we cannot find it to be clearly erroneous.[3] In view of this specific finding, the trial court correctly denied the motion to suppress.

[2] The state objected to the taking of any testimony concerning alleged false statements or omissions unless the trial court first made a determination that the defendant had made "a substantial preliminary showing" as required by *Franks* v. *Delaware*, 438 U.S. 154, 155, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Without specifically making such a finding the court proceeded with a hearing on the motion to suppress. Although it is the better practice for the trial court to make a specific finding that the requisite preliminary showing has been made by the defendant, in this case the court implicitly found that the showing had been made, because it proceeded to address the merits of the defendant's claim.

[3] Although the defendant, his wife, and his daughter all testified at the suppression hearing that the defendant told Daloisio that he arrived home at about noon on May 9, the defendant does not press a claim that Daloisio lied about the content of the statements made by the defendant. Such an argument would be futile, because the court, which was the sole judge of

## II

### Bill of Particulars

The defendant's next claim is that the trial court, *N. O'Neill, J.*, erred by denying his pretrial motion for a further bill of particulars after the state had filed one bill of particulars. The true bill returned by the grand jury on August 16, 1979, charged that the defendant murdered the victim on May 9, 1979. On August 23, 1979, the defendant filed a motion for a bill of particulars as to the time of the offense and the place of the offense. On September 19, 1979, the state filed its bill of particulars, stating that the crime was committed on "May 9, 1979 between the hours of 9:00 a.m. and 3:56 p.m." at the victim's home. On October 2, 1979, the defendant filed a motion for a further bill of particulars seeking to have the time of day of the offense made more specific. The trial court denied the motion.

"The accused in a criminal proceeding has a right to be informed of the nature and cause of the accusation. U.S. Const. amend. VI; Conn. Const. art. I § 8. The offense should be described with sufficient definiteness and particularity to apprise the accused of the nature of the charge so he can prepare to meet it at his trial. 2 Wharton, Criminal Procedure § 258 (12th Ed. 1975). The function of the bill of particulars under Connecticut practice is to enable the defendant to obtain a more precise statement of the offense charged in the information in order to prepare a defense." *State* v. *Troynack*, 174 Conn. 89, 96, 384 A.2d 326 (1977). Practice Book § 832 requires "that a bill of particulars

credibility in this situation, rejected this testimony and chose to believe the testimony of Troopers Daloisio and Cavanaugh that the defendant stated that he "got home from the victim's house between 10:30 and 10:45 a.m. and remained home the rest of the day."

disclose information sufficient to enable the defendant to prepare his defense, including but being not limited to reasonable notice of the crime charged and the date, time, and place of its commission."

" 'A motion for a bill of particulars is addressed to the sound discretion of the trial court. *United States* v. *Gray*, 464 F.2d 632, 635 (8th Cir. [1972]); *Wong Tai* v. *United States*, 273 U.S. 77, 80–81, 47 S. Ct. 300, 71 L. Ed. 545 [1927]; *State* v. *Beaulieu*, 164 Conn. 620, 624, 325 A.2d 263 [1973]; *State* v. *DiBella*, 157 Conn. 330, 339, 254 A.2d 477 [1968]. . . . [A]n abuse of discretion in the denial of a motion for a bill of particulars can be premised only upon a clear and specific showing of prejudice to the defense; *State* v. *Curtis* . . . [146 Conn. 365, 368, 151 A.2d 336 (1959)]; see *United States* v. *Addonizio*, 451 F.2d 49, 64 (3d Cir.) [cert. denied, 405 U.S. 936, 92 S. Ct. 949, 30 L. Ed. 2d 812, reh. denied, 405 U.S. 1048, 92 S. Ct. 1309, 31 L. Ed. 2d 591 (1972)].' *State* v. *Hauck*, 172 Conn. 140, 151, 374 A.2d 150 [1976]. The defendant has the burden of showing why the additional particulars were necessary to the preparation of his defense. *State* v. *DiBella*, 157 Conn. 330, 339, 254 A.2d 477 [1968]; *State* v. *Curtis*, 146 Conn. 365, 367, 151 A.2d 336 [1959]." *State* v. *Brown*, 173 Conn. 254, 257, 377 A.2d 268 (1977).

The gravamen of the defendant's complaint on appeal is that because he offered an alibi defense,[4] the seven hour time frame stated in the bill of particulars forced

[4] That a defendant may offer an alibi defense is a factor to be considered by the court in deciding whether to grant a motion under Practice Book § 832, but an alibi defense does not create a per se requirement that the state limit the times in the information more narrowly than the evidence available warrants. Whether the evidence available to the state has shown beyond a reasonable doubt that the defendant was at the scene of the crime at a time when it could have been committed is an issue for the jury to determine.

him to bear "the burden of accounting for his whereabouts at other times not relevant to the state's claim" that the defendant was the murderer and that "the examination of witnesses would have been more properly confined to a relevant time frame had the state alleged the time of the crime with more particularity."

The state has a duty to inform a defendant, within reasonable limits, of the time when the offense charged was alleged to have been committed. The state does not have a duty, however, to disclose information which the state does not have. Neither the sixth amendment of the United States constitution nor article first, § 8 of the Connecticut constitution requires that the state choose a particular moment as the time of an offense when the best information available to the state is imprecise. If the state had known to a reasonable certainty that the murder was committed within a narrower time frame than that provided in the bill of particulars, then the defendant's claim of error would be more convincing. But the state was not able to determine the time of death more precisely than the medical examiner's testimony that it was "closer to the morning hours than to the afternoon."

Furthermore, the defendant does not allege that he was unable to prepare or to present his defense of alibi properly, but only that it was more burdensome and difficult to do so. Even if the state had been able to narrow the time frame, burdens of the kind alleged by the defendant are not of sufficient magnitude to prejudice his ability to present an adequate defense. Under these circumstances, the trial court, *N. O'Neill, J.*, did not err in denying the motion for a further bill of particulars.

## III

### Exclusion of Evidence of Blood-Stained Clothing

The defendant's next claim is that the trial court erred when it refused to permit him to introduce through an expert witness evidence relating to blood stains on two pairs of trousers allegedly belonging to the defendant. State's exhibit 1 was a pair of trousers belonging to the defendant which had a pattern of contact bloodstains,[5] testing as type AB, Rh negative, on the inside of the legs between the crotch and knee. The victim's blood type was AB, Rh negative, while the defendant's was B, Rh positive.

The defendant's expert theorized that the bloodstains could be from the defendant's own blood that had stained the trousers after he had scratched poison ivy sores on his legs. The defendant testified that he had such open sores on his legs at the time of the murder and that he had been treating them with a calamine-type lotion.[6] The defendant's expert serologist testified that when blood of group B, the defendant's type, was mixed with calamine, dried, and then reconstituted for testing, it could test falsely as group AB, the victim's blood type. The expert had not attempted to discover whether the calamine also could affect testing of Rh factors, and the state did not present any evidence on the point.

[5] A contact bloodstain is one where a spot of blood is absorbed after contact with clothing, as opposed to a splattered bloodstain which produces a discernibly different pattern.

[6] Both the defendant and Mrs. Stepney testified that he had poison ivy all over his body. The police observed poison ivy sores only on the defendant's arms on the day of the murder. Mrs. Stepney failed to mention that the defendant had any sores on his legs in her testimony at a pretrial motion to suppress.

The defendant tried to introduce two pairs of trousers that also had contact bloodstains on the insides of the legs. These trousers allegedly had been found along with several other items by the defendant's wife in a "rag bag" in the basement of the defendant's home on the second day of trial. Mrs. Stepney could not say whether any of the items had been laundered before being placed in the bag. She testified that some items might have been lying around for more than two years, that is, many months earlier than the date of the crime. She could not say whether the trousers had been worn by the defendant at or near the date of the crime. The stains were only of type B blood, and no traces of calamine lotion could be detected on the trousers.

The state objected to the offer of the trousers or of testimony concerning tests conducted on them, claiming that the evidence was irrelevant because no proper foundation had been laid connecting the trousers to the time of the incident. The trial court agreed and refused to admit the trousers or the testimony.[7] The defendant then made an offer of proof that the trousers were stained in a pattern similar to the pattern on state's exhibit 1 and that because the stains were of a similar pattern and type, "the jury could consider whether or not [the defendant] had other problems with the same type of poison ivy problem on the inside of his pants . . . ." The court again sustained the state's objection.

[7] The state's objection and the court's ruling were as follows:

"Ms. Dranginis [Assistant State's Attorney]: Your Honor, I'm going to object to the offer on the basis essentially of relevance insofar as these items being tested. There has been testimony by Mrs. Stepney that she doesn't really know when they were worn in conjunction with this incident. She doesn't know how many times they were worn by Mr. Stepney, when they were worn, when they were washed. They were admittedly left in a rag-bag with all sorts of other things that could have been contaminated, without any kind of protection for up to two years in the basement of their house, and I don't know what significance any tests could have on those, nor do I feel it would be proper in terms of protection of those items to have any results of any tests on those items put before this jury. I don't think that

"When determining if the object should be admitted, the trial court should consider the nature of the article, the circumstances surrounding the preservation and custody of it, and the possibility of intermeddlers tampering with it." *People* v. *Prast*, 319 N.W.2d 627, 636 (Mich. App. 1982); see also *State* v. *Alford*, 384 So. 2d 761, 765, (La. 1980); *Washburn* v. *State*, 318 S.W.2d 627, 635-36 (Tex. Crim. App. 1958). The trial court in the present case refused to admit the trousers because "[w]e can't tell . . . how long they had been where they were found, what has happened to them, what might have stained them. All of those factors are unknown . . . ." The defendant claimed that the trousers were relevant to show the possibility that the defendant might have had poison ivy on his legs at some other time. If the defendant could have established when he wore the pants and that he had been afflicted with poison ivy at that time, the proffered evidence might have been marginally relevant to show that it was possible that the stains on state's exhibit 1 were from bleeding poison ivy. The state, however, never contested that such stains were a theoretical possibility; it claimed rather that they were not actually made in that way. The trial court reasonably could have concluded that the foundation laid for admission of the trousers was insufficient to support even the inference

the integrity of those items has been sufficiently kept so that they can become items from which test results can be demonstrated to this jury.

"Mr. Wade [Defense Counsel]: I claim the relevance. I think she is talking about the weight that should be accorded.

"Ms. Dranginis: Your Honor, I think before anything goes to the jury, there are certain standards that have to be met. We went through a lot of that in terms of the evidence in this case, and nothing is sitting around for two years in a basement mixed with a lot of other stuff.

"The Court: Well, it seems to me at this point that is a problem that is difficult to overcome. We can't tell, first of all, how long they had been where they were found, what has happened to them, what might have stained them. All of those factors are unknown, so, unless they—unless it can be established, it seems to me that the objection is sound."

suggested by the defendant. The court was not required to admit evidence that was merely speculative. Under all the circumstances, we cannot say that the trial court abused its discretion when it refused to admit evidence concerning the trousers. See *State* v. *Bennett*, 20 Wash. App. 783, 788, 582 P.2d 569 (1978).

## IV

### Jury Charge on Credibility

During its charge to the jury on the credibility of witnesses, the trial court, *Stoughton, J.*, stated in part: "It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached. Evidence was offered in this case, as I remember it and, of course, this is for you to recall. Your recollection is controlling.

"I think there was evidence of statements, for example, by Mrs. Stepney which you may believe to have been inconsistent with her testimony. You heard the evidence and you heard her explanation as to some of it, anyway. It is for you to remember the testimony, of course. You may find other examples, and it is for you to determine whether these or any of them are in fact inconsistent and, if they are, the weight you will give them in weighing the credibility of the witness, and that is the sole purpose for which they were admitted. This is the case with any claimed inconsistent statement which was admitted during the trial as to any witness."

The defendant claims that by specifically mentioning only Mrs. Stepney as having been impeached, "the court in effect said that [her] testimony should be subject to special scrutiny and a special set of rules." Although he assigns error to this portion of the court's

charge, the defendant never makes clear the grounds, constitutional or otherwise, upon which error should be found.

"The defendant was entitled to have the jury correctly and adequately instructed. *Mack* v. *Perzanowski*, 172 Conn. 310, 312, 374 A.2d 156 (1977)." *State* v. *Hines*, 187 Conn. 199, 206, 445 A.2d 314 (1982). " 'The test to be applied to any part of a charge is whether the charge considered as a whole presents the case to the jury so that no injustice will result.' *State* v. *Mullings*, 166 Conn. 268, 275, 348 A.2d 645 [1974]; *Siladi* v. *McNamara*, 164 Conn. 510, 515, 325 A.2d 277 [1973]." *State* v. *Roy*, 173 Conn. 35, 40, 376 A.2d 391 (1977). " 'It is a well-established rule that the charge to the jury must be read as a whole and that individual instructions are not to be judged in "artificial isolation" from the overall charge. *Cupp* v. *Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 [1973]; *State* v. *Ralls*, 167 Conn. 408, 422, 356 A.2d 147 [1974].' *State* v. *Crawford*, 172 Conn. 65, 69, 372 A.2d 154 [1976]." *State* v. *Holmquist*, 173 Conn. 140, 151, 376 A.2d 1111, cert. denied, 434 U.S. 906, 98 S. Ct. 306, 54 L. Ed. 2d 193 (1977).

"Common sense, and more to the point, fairness, must acknowledge that the use of a proper example in jury instructions serves to make less abstract and more comprehensible the meaning of a complex legal concept or term. The same considerations, however, would indicate that a jury may give undue weight to examples because they are easier to understand and may even simply compare the defendant's actions with the example. 'To prevent these adverse effects, the trial judge must clearly indicate that the examples are *only* examples, and that the jury must determine guilt or

innocence by following the jury instructions as a whole.' (Emphasis in original.) *People* v. *Shepherd*, 63 Mich. App. 316, 322, 234 N.W.2d 502 (1975) . . . . 'In considering whether an illustration is fair or prejudicial, it is necessary to consider the instructions as a whole and all the facts and circumstances surrounding the trial and shown by the evidence, such as the complexity or simplicity of the issues and the multiplicity of facts.' *Luteran* v. *United States*, 93 F.2d 395, 401 (8th Cir. 1937), cert. denied, 303 U.S. 644, 58 S. Ct. 642, 82 L. Ed. 1103 (1938)." *State* v. *Hines*, supra, 210–11.

"On numerous occasions this court has stated that the trial court in a criminal case may, in its discretion, make fair comment on the evidence and particularly on the credibility of witnesses." *State* v. *Cari*, 163 Conn. 174, 182, 303 A.2d 7 (1972), quoted in *State* v. *Bennett*, 172 Conn. 324, 329, 374 A.2d 247 (1977). The trial court's illustrative comment concerning contradictions in Mrs. Stepney's testimony was certainly "fair comment" on her testimony. Her cross-examination revealed numerous contradictions between her trial testimony and prior statements at the suppression hearing or to the police concerning the defendant's actions on the day of the murder. A review of the record convinces us that the court's reference to Mrs. Stepney's testimony did not unduly emphasize the extent of the impeachment, but served as an example to the jury to illuminate the credibility instruction. It was both clearly labelled as an example and surrounded by careful qualifying language. The court repeatedly reminded the jury that they were the sole judges of credibility. It emphasized that the jury's recollections of the testimony governed over any comments the court had made. The court's instructions, read as a whole, were scrupulously

fair and balanced,[8] and the challenged credibility instruction was well within the court's discretion. There was no error in the instructions to the jury.[9]

## V

### Admissibility of the Defendant's Hearsay Declarations

The state offered in its case in chief testimony by police officers of statements made by the defendant at two interviews conducted on the day of the murder. The court admitted the testimony as admissions by the defendant over the defendant's objection that the statements were inadmissible hearsay. The defendant claims on appeal that the court's action was error. We disagree.

An out-of-court statement that is offered to establish the truth of the matters contained therein is hearsay. *State* v. *Packard*, 184 Conn. 258, 274, 439 A.2d 983 (1981). Though generally inadmissible, hearsay may be admitted if there is a sufficient probability that the statement is reliable and trustworthy, if the evidence contained in the statement is necessary to resolution of the case, and if the trial court concludes that admit-

[8] The following portion of the instructions, given just before the jury retired to deliberate, is illustrative of the court's balanced approach throughout its instructions:

"Remember, as I have told you before, that your recollection of the facts is controlling, and that it is your function to determine what those facts were. Remember that the burden of proof is on the State throughout the case. The defense does not have to disprove the case or prove anything. As I have said, if I have referred to testimony of any witnesses, I do not mean to emphasize that over any other testimony in the case. You must remember that you are the sole judges of the facts. If I did make any reference here and there to the testimony, you disregard what I say, if it differs from your recollection, because your recollection is controlling."

[9] The defendant's challenge to the instruction concerning the defendant's interest in the outcome of the trial is "utterly without merit." *State* v. *Roos*, 188 Conn. 644, 645, 452 A.2d 1163 (1982).

ting the statement is in the interests of justice. 5 Wigmore, Evidence (Chadbourn Rev. 1974) § 1422, pp. 253-54. Some types of admissible hearsay occur frequently enough that certain defined exceptions to the general rule of inadmissibility have come to be recognized.

Among the recognized exceptions to the hearsay exclusionary rule is that for admissions of a party. *State* v. *DeMatteo*, 186 Conn. 696, 702, 443 A.2d 915 (1982); Tait & LaPlante, Connecticut Evidence § 11.5, p. 186 (1976); McCormick, Evidence (2d Ed. 1972) § 262, p. 628. The statements in dispute were allowed by the trial court as admissions by the defendant. The defendant claims, however, that "[t]o qualify as an admission, a statement made by a party must be inconsistent with a position which he takes at trial." *State* v. *Villafane*, 171 Conn. 644, 674, 372 A.2d 82 (1976), cert. denied, 429 U.S. 1106, 97 S. Ct. 1137, 51 L. Ed. 2d 558 (1977). The defendant asserts that because the proffered statements by the defendant were exculpatory and therefore consistent with his plea of "not guilty," they were not admissions, and the court erred by admitting them.[10] We disagree.

" 'An admission, as applied to criminal cases, is the avowal or acknowledgment of a fact or of circumstances from which guilt *may* be inferred, and only *tending* to prove the offense charged, but not amounting to a confession of guilt.' *Riley* v. *State*, 1 Ga. App.

[10] This court in *State* v. *Villafane*, 171 Conn. 644, 674, 372 A.2d 82 (1976), cert. denied, 429 U.S. 1106, 97 S. Ct. 1137, 51 L. Ed. 2d 558 (1977), found that the defendant's cross-examination of a state's witness revealed the defendant's position at trial, and that the defendant's hearsay statements were contradictory to that position. The trial court in the present case used similar reasoning. Because we hold today that admissions in criminal cases need not be shown to be inconsistent with a position taken at trial, we need not discuss the theory that cross-examination by a defendant alone may reveal a position at trial.

651, 654 (57 SE 1031) (1907). An acknowledgment by the defendant that he was present at or near the scene of the crime, while not a confession, can be found by the jury to be incriminatory in light of other facts. . . . One circumstance which the jury could have properly taken into consideration in determining that the statements made by the appellant were incriminatory was that the statements were contradictory. . . . Statements which are intended to be exculpatory may, nonetheless, be found to be inculpatory. 'Declarations made with an exculpatory object may have an inculpatory effect.' *Fletcher* v. *State*, 90 Ga. 468 (3) (17 SE 100) (1892)." (Citations omitted.) *Pendergrass* v. *State*, 245 Ga. 626, 627, 266 S.E.2d 225 (1980). "The statements made out of court by a party-opponent are universally deemed admissible when offered against him"; 4 Wigmore, Evidence (Chadbourn Rev. 1972) § 1048, p. 2; so long as they are relevant and material to issues in the case. Although the theories for admissibility differ,[11] the vast weight of authority, judicial, legislative, and scholarly, supports the admissibility without restriction of any statement of a party offered against that party at trial.[12] At least seventeen states admit evidence of admissions as exceptions to the hearsay exclusionary rule in criminal cases without requiring that they be contrary to the party's position at trial.[13]

[11] Compare Morgan, Basic Problems of Evidence 265 (1962), and 4 Wigmore, Evidence (Chadbourn Rev. 1972) § 1048, pp. 2–5, with Commentary to Federal Rule of Evidence 801 (d) (2), McCormick, Evidence (2d Ed. 1972) § 262, p. 629, and Strahorn, "A Reconsideration of the Hearsay Rule and Admissions," 85 U. Pa. L. Rev. 484, 564 (1937).

[12] See, e.g., 4 Wigmore, Evidence (Chadbourn Rev. 1972) § 1048; McCormick, Evidence (2d Ed. 1972) § 262; Tait & LaPlante, Connecticut Evidence § 11.5 (1976); 3 Wharton, Criminal Evidence (13th Ed. 1973) § 694; 31A C.J.S., Evidence § 270 et seq; Uniform Rules of Evidence 63 (7), 63 (8), 63 (9).

[13] Cal. Evid. Code § 1220 (Deering 1966); Fla. Stat. Ann. § 90. 803 (18) (West 1979); Hawaii Rev. Stat. c.626, Rule 803 (a); Kans. Stat. Ann. § 60-460 (g) (1976); *People* v. *Wheelwright*, 262 Cal. App. 2d 63, 69, 68 Cal. Rptr.

Eighteen other states and the federal courts consider admissions to be a separate category of substantive evidence which is not hearsay at all.[14]

In *State* v. *Villafane*, supra, 674, upon which the defendant relies, we stated without comment a definition of an admission which previously had been announced only as dicta in two civil cases.[15] Because we found in *Villafane* that the admitted statement was inconsistent with the defendant's position at trial and therefore admissible, we discussed the claim of error in one paragraph and made no attempt to analyze the basis for or effect of the rule we announced. An analysis of the differences between civil and criminal trials indicates that in *Villafane* our reliance on civil precedents to define admissions in criminal proceedings was misplaced.

356 (1968); *Pendergrass* v. *State*, 245 Ga. 626, 627, 266 S.E.2d 225 (1980); *Martinez* v. *State*, 90 Id. 229, 231–33, 409 P.2d 426 (1965); *People* v. *Richardson*, 21 Ill. 2d 435, 439, 172 N.E.2d 801 (1961); *Jethroe* v. *State*, 262 Ind. 505, 511, 319 N.E.2d 133 (1972); *State* v. *Kennedy*, 224 N.W.2d 223 (Iowa 1974); *Dolan* v. *Commonwealth*, 468 S.W.2d 277 (Ky. 1971); *State* v. *Walker*, 344 So. 2d 990, 995 (La. 1977); *Harris* v. *State*, 27 Md. App. 547, 553, 342 A.2d 305 (1975); *Commonwealth* v. *Wood*, Mass. Adv. Sh. 2269, 2271–72, 428 N.E.2d 820 (1981); *State* v. *Martineau*, 116 N.H. 797, 799, 368 A.2d 592 (1976); *State* v. *Bowden*, 113 R.I. 649, 663, 324 A.2d 631 (1974); *State* v. *Jones*, 598 S.W.2d 209 (Tenn. 1980); *Land* v. *Commonwealth*, 211 Va. 223, 229, 176 S.E.2d 586 (1970). In seven other states which recognize the admissions exception, this issue has not been clearly addressed. *Trest* v. *State*, 409 So. 2d 906 (Ala. Crim. App. 1981); *State* v. *Thresher*, 350 S.W.2d 1, 9 (Mo. 1961); *Commonwealth* v. *Evans*, 190 Pa. Super. 179, 246, 154 A.2d 57 (1959), aff'd, 399 Pa. 387, 160 A.2d 407, cert. denied, 364 U.S. 899, 81 S. Ct. 233, 5 L. Ed. 2d 194 (1960); *State* v. *Rotenberry* 284 S.E.2d 197 (N.C. App. 1981); *State* v. *Plyler*, 275 S.C. 291, 295, 270 S.E.2d 126 (1980); *Spradling* v. *State*, 628 S.W.2d 123, 125 (Tex. Crim. App. 1981); *State* v. *Wilson*, 294 S.E.2d 296, 298 (W. Va. 1982).

[14] A compilation of states following the Federal Rules of Evidence, including notations of variations from the original text, may be found in 1 Weinstein's Evidence, State Adaptations of the Federal Rules of Evidence (1982). Federal Rule of Evidence 801 (d) (2) is compiled at T. 115–123.

[15] In *Johnson* v. *Rockaway Bus Corporation*, 145 Conn. 204, 209, 140 A.2d 708 (1958), the statements at issue had been offered as declarations against interest and excluded by the trial court. This court's statement that "the

In a civil case each party files pleadings which are conclusive as to matters admitted therein; *Hirsch* v. *Thrall*, 148 Conn. 202, 206-207, 169 A.2d 271 (1961); each may be required to submit to extensive pretrial discovery; Practice Book §§ 219-249; and each may be called to testify by the opposing party. A party's full position at trial is therefore readily ascertainable. Thus, a requirement that the proffered admission be contradictory with that position is not an obstacle to the admissibility of an admission in a civil trial.

In a criminal trial, however, the defendant is not required to take any particular position at trial. The privilege against compulsory self-incrimination permits the defendant to stand mute and to force the state to prove guilt beyond a reasonable doubt.[16] There is no responsive pleading required. The defendant cannot be forced to testify or to present any evidence. In a case where the defendant chose not to present any evidence, the rule in *Villafane* would make it impossible for the state to introduce extra-judicial statements by the defendant which were not tantamount to full confessions of guilt, because it could not show that the statements were contradictory to the defendant's trial position.

admissibility of the evidence as an admission by [the defendant] . . . would depend upon whether [the] claimed admission was inconsistent with claims made by him on the trial . . ." was purely dictum used to illustrate that the court had not considered the proffered statements under the admissions exception. *Hill* v. *Small*, 129 Conn. 604, 605, 30 A.2d 387 (1943) cited as authority both in *Johnson* v. *Rockaway Bus Corporation*, supra, and in *State* v. *Villafane*, 171 Conn. 644, 674, 372 A.2d 82 (1976), cert. denied, 429 U.S. 1106, 97 S. Ct. 1137, 51 L. Ed. 2d 558 (1977), states only that a contradictory statement made out of court by a party may be treated as an admission. That case in no way limits admissions to statements contradictory of a position taken at trial. In sum, the definition of an admission in *Villafane* is based on dictum in *Rockaway*, which dictum was not even supported by the authority cited therein.

[16] A plea of "not guilty" is insufficient to define the defendant's position at trial. Such a plea does not necessarily claim that the defendant is inno-

The privilege against self-incrimination extends only to statements which are compelled by the government. It does not protect against disclosure of statements voluntarily made to agents of the government or of statements made to third parties. *State* v. *Barlow*, 177 Conn. 391, 395, 418 A.2d 46 (1979); *State* v. *Zeko*, 176 Conn. 421, 425, 407 A.2d 1022 (1979). Yet the rule announced in *Villafane* would permit a defendant to shield such statements behind the privilege whenever the defendant decided not to present a defense. We are presented with no persuasive reason why the privilege should be thus enlarged to exclude from the trier of fact, at the option of the defendant, reliable and probative evidence of voluntary statements made by the defendant. To the extent that language in *State* v. *Villafane*, supra, 674, permits such an extension, it is overruled.

In the case before us, the defendant's statements to the officers acknowledged, inter alia, that he was in the victim's home on the day of the murder at times during which it may have occurred and that he had consumed alcoholic beverages with the victim. These are facts and circumstances "pertinent to the issue and tending, in connection with proof of other facts, to prove his guilt." *People* v. *Richardson*, 21 Ill. 2d 435, 439, 172 N.W.2d 801 (1961). They were therefore admissions, and the trial court did not err in admitting them as exceptions to the hearsay rule. *People* v. *Wheelwright*, 262 Cal. App. 2d 63, 69, 68 Cal. Rptr. 356 (1968); *Pendergrass* v. *State*, supra; *Martinez* v. *State*, 90 Id. 229, 231, 409 P.2d 426 (1965).

cent of the crime charged, but rather states the defendant's position that the state cannot prove beyond a reasonable doubt that the defendant committed the crime charged.

## VI

### Sufficiency of the Evidence

The defendant's final claim is that the trial court erred in denying his motions for judgment of acquittal and for a new trial because the evidence was insufficient to support his guilt beyond a reasonable doubt. We disagree.

"When a verdict is challenged because of insufficient evidence, the issue is whether the jury could have reasonably concluded, upon the facts established and the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt. *State* v. *Ruiz,* 171 Conn. 264, 276-77, 368 A.2d 222 (1976); *State* v. *Benton,* 161 Conn. 404, 407, 288 A.2d 411 (1971). It is the province of the jury to draw reasonable and logical inferences from the facts proved. *State* v. *Williams,* 169 Conn. 322, 336, 363 A.2d 72 (1975). There is no distinction between direct and circumstantial evidence so far as probative force is concerned; *State* v. *Cari,* 163 Conn. 174, 179, 303 A.2d 7 (1972); and the evidence must be given a construction most favorable to sustaining the jury's verdict. *State* v. *Brown,* 169 Conn. 692, 695, 364 A.2d 186 (1975)." *State* v. *Nemeth,* 182 Conn. 403, 410, 438 A.2d 120 (1980); see *State* v. *Ferrell,* 191 Conn. 37, 46, A.2d (1983). We do not sit as a thirteenth juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. We have not had the jury's opportunity to observe the conduct, demeanor, and attitude of the witnesses and to gauge their credibility. See *State* v. *Martin,* 189 Conn. 1, 9, 454 A.2d 256 (1983); *Kaplan* v. *Kaplan,* supra, 391; *State* v. *Festo,* 181 Conn. 254, 260-61, 435 A.2d 38 (1980).

The jury had before it evidence that the defendant had been in the victim's house on the day of the crime, and that his truck had been seen there as late as 11:30 a.m. The medical examiner's opinion was that the death occurred closer to the morning hours than to the afternoon. Blood which tested as the victim's blood type was found on the defendant's trousers, on his shoes, and on the steering wheel of his truck. A beer can of the same unusual size that the defendant had bought on the day of the murder was found near the body in the bedroom with the victim. When the defendant was asked about sharing a beer with the victim, he became angry and terminated an interview with the state police. Although in a statement made on the night of the murder the defendant had limited his presence at the victim's house to the period from 9:30 to 9:50 a.m., there was other testimony indicating that the defendant's statement was untrue.

From all of the evidence the jury reasonably could have concluded that the defendant killed the victim. Although the defendant presented expert opinion evidence which the state never attempted to refute that the tests of the bloodstains could have been inaccurate and that the stains may have been the defendant's own blood, the jury were not required to conclude that the defendant's theory was correct, that the state's test results were incorrect, or that the blood was not that of the victim. The state's case was necessarily based on circumstantial evidence. Viewing the evidence in the light most favorable to sustaining the verdict, however, we cannot say as a matter of law that the jury could not have found the defendant guilty of murder beyond a reasonable doubt.

There is no error.

In this opinion the other judges concurred.

(PORTION OF CHARGE TO JURY)

The credibility of witnesses and the weight to be accorded their testimony is [sic] matters entirely within your hands and solely for you to determine. No fact is to be determined merely by the number of witnesses testifying to it, because it is the quality and not the quantity of the testimony which concerns you. In weighing the testimony of the several witnesses, you may consider their appearance on the witness stand, any interest or possible bias which they may have, either for or against the State or the accused or in the outcome of the case. You may consider their ability to observe facts correctly and to relate them to you truly and accurately. You should test the evidence by your own knowledge of human nature and the motives which influence and control human beings. In short, you should bring to bear on the

testimony of the several witnesses the same consideration and use the same sound judgment that you would apply to questions of truth and veracity as they present themselves to you in the everyday affairs of your life.

You are entitled to accept any testimony which you believe to be true and to discredit either wholly or in part the testimony of any witness you believe is testifying untruthfully or erroneously. The credit that you will give to the testimony offered of the various witnesses, as I have stated, is your sole determination.

The testimony of a witness may be discredited or impeached by showing that he or she previously made statements which are inconsistent with present testimony. The earlier contradictory statements are admissible only to impeach the credibility

of the witness and not to establish the proof of those statements.

It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached. Evidence was offered in this case, as I remember it and, of course, this is for you to recall. Your recollection is controlling.

I think there was evidence of statements, for example, by Mrs. Stepney which you may believe to have been inconsistent with her testimony. You heard the evidence and you heard her explanation as to some of it, anyway. It is for you to remember the testimony, of course. You may find other examples, and it is for you to determine whether these or any of them are in fact inconsistent and, if they are, the weight you will give them in weighing the credibility of the witness, and that is the sole

purpose for which they were admitted. THis is the case with any claimed inconsistent statement which was admitted during the trial as to any witness.

Where a witness testifies inaccurately and you do not think that the inaccuracy was consciously dishonest, you should bear that inmind and scrutinize the whole testimony of the witness. The significance which you would attach to the testimony would vary more or less with the particular fact as to which the inaccuracy existed or the surrounding circumstances which in your mind ought to have impressed it upon and caused a correct retention of it to have been made in the memory of the witness. It is, after all, a question for you to pass upon. If you find that there has been an inaccuracy in one respect on the part of a witness, remember it in judging the rest of that testimony and give to it that weight

which your own mind leads you to think it should have and which you would attach to it in the ordinary affairs of life when anyone came to you and you found that in some particular he or she was inaccurate.

If, however, you conclude that a witness not only testified falsely, but that this was done intentionally or willfully, that fact will cast a very serious doubt upon all that testimony, and you might well conclude that you cannot accept any of it. That, however, is a matter for you to determine. Even though you find a person intentionally gave false testimony on certain matters, you may find that as to certain other matters that person gave testimony worthy of acceptance by you as true. After all, whether you should disregard all that testimony or believe some parts of it is for you to decide. (T.T. 2204-08) (emphasis added)

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NO. 83-949

# In The
# Supreme Court Of The United States

OCTOBER TERM, 1983

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WILLIAM H. STEPNEY, JR.,
*Petitioner,*

v.

STATE OF CONNECTICUT,
*Respondent.*

---

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

---

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## QUESTIONS PRESENTED

1. Should this Court review a claim not pressed or passed upon below that the introduction of evidence concerning the invocation of the petitioner's constitutional rights while providing a noncustodial statement to the police violates his privilege against self-incrimination?
2. Should this Court review a claim, never heretofore seasonably identified as a federal question, that a state trial court unfairly commented on the credibility of the petitioner's principal alibi witness?
3. Should this court review a claim, never heretofore seasonably identified as a federal question, that a state trial court may not instruct the jury that

they may consider the defendant's interest in the outcome of the case?

4. If questions 3 and 4 standing alone do not merit this Court's review, should this Court review this case based on the contention that the alleged errors raised in those questions, when combined, denied the petitioner due process?

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## RULE INVOLVED

### Rule 17.1
### Revised Rules of the Supreme Court of the United States

**Considerations Governing Review on Certiorari**

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed

from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

## STATEMENT OF THE CASE

As its statement of the case, the state adopts, with only the minor modification made at the end, the following excerpt from the opinion of the Connecticut Supreme Court:

> On May 9, 1979, at approximately 3:45 p.m., the body of Mrs. Barbara McKitis was discovered in the bedroom of her home in Bantam. The victim had been severely beaten with a blunt object, possibly a blood-stained brick found near the body. There were five "chop" wounds on her skull, consistent with the use of an axe or hatchet. Multiple stab wounds and slash wounds were found on her head, neck, and legs. One of the stab wounds in her neck had severed the vertebral artery. There was a penetration wound to the victim's genitalia, which had been made before death.
>
> The body was lying on its left side on the floor of the bedroom near the bed. The victim's dungarees were pulled down around the ankles and her panties were around her knees. Blood was spattered on the bed, the carpet, the walls, and on other objects throughout the bedroom, which was in extreme disarray. A butcher knife was found under the body and an eight ounce Budweiser beer can was lying approximately eighteen inches away. The medical examiner estimated that

death had occurred "closer to the morning hours than to the afternoon."

The defendant had met the victim on May 3, 1979, six days before the murder, in connection with an on-going tag sale of furniture and household goods she was holding following a separation from her husband. The defendant returned to the victim's house with his wife and daughter on May 5 and May 7 to buy a few items. He also arranged to help her clear some scrap metal out of her garage to sell to a junk dealer. On May 8, the defendant spent most of the day at the victim's house, during which time he filled his truck with scrap metal. He drove the fully loaded truck to his home in Morris that evening. Early the next day, the day of the murder, the defendant drove the truckload of scrap metal to a junkyard in Waterbury, returning home between 9:30 and 10 a.m. When the defendant told his wife that he was going to the victim's house to split the money from the sale of the scrap with her and to pick up another load, Mrs. Stepney became annoyed and a quarrel ensued. The defendant left home in his truck some time after 10 a.m. Between 10 and 10:30 a.m., he bought an eight pack of eight ounce Budweiser beer in Morris, and between 10 and 11 a.m. he bought another eight pack in Bantam. His truck was seen parked in the victim's backyard sometime between 10:30 and 11 a.m. The defendant's truck left the victim's house between 11:15 and 11:30 a.m. and arrived at the defendant's house between 11:45 a.m. and noon.

> The defendant's own testimony was that he arrived in his truck at the victim's house on May 9, the day of the murder, at about 10:45 a.m. He drank one of the eight ounce cans of beer and gave another to the victim. He stated that he and the victim talked together for thirty minutes or so, and that he mixed the victim a highball during that time. He arrived back at this own home at about noon.
>
> The victim's blood was type AB, Rh negative. The defendant's blood was type B, Rh positive. Bloodstains which tested as AB negative were discovered on the inside of a pair of green workpants seized from the defendant, on the sole of a canvas shoe belonging to the defendant, and on the steering wheel of the defendant's truck.

Petition at 3A-5A. On the basis of this evidence the jury found the petitioner guilty of murder. The trial judge imposed a prison sentence of twenty-two years to life. State Appellate Record [hereinafter R] at 13. The defendant appealed to the Connecticut Supreme Court, which unanimously affirmed his conviction.

## REASONS FOR THE DENIAL OF THE WRIT

### I. THE PETITIONER'S FIRST CLAIM WAS NOT PRESSED OR PASSED UPON BELOW AND IS INSUBSTANTIAL ON THE MERITS

#### A. The Claim Was Not Pressed or Passed Upon Below

The petitioner first seeks a writ of certiorari on the ground that the introduction at trial of his noncustodial statement to the police that he wanted to stop answering questions and consult with an attorney as well as the introduction of evidence of his demeanor at the time violated his privilege against self-incrimination. This court should decline review because this claim was not "pressed or passed upon below." Illinois v. Gates, 103 S.Ct. 2317, 2321-22 (1983).

At the conclusion of his objection at trial to the introduction of the challenged evidence the defendant told the trial judge that he was "dealing here with a pure

evidentiary question and the rules of court and not any constitutional claim." Trial Transcript [hereinafter TT] at 1237. Thus not only did the petitioner fail to raise the constitutional issue in the trial court but he expressly urged the trial court not to consider it. The petitioner, in fact, admits to this Court that the basis of his objection at trial was the state law claim that the trial court should have excluded his statements on the ground that "they were hearsay, exculpatory, and not inconsistent with his plea of not guilty." Petition at 32 n.3. See also id. at 31 n.2 ("[Petitioner's] claim at the trial was merely an evidentiary claim as to the admissibility of his statement."); id. at 34 ("Petitioner objected at the trial court level, in his appeal brief (p. 56-57), in oral argument to the Connecticut Supreme Court, and in his motion to reargue, that the invocation of a constitutional right could in no way be

deemed to be an admission by the petitioner and therefore admissible as an exception to the hearsay rule.").

The petitioner nevertheless makes the brash and untoward allegation that "[t]he petitioner's objection to the invocation of his constitutional right to remain silent and for consultation with an attorney does not even appear in the Connecticut Supreme Court opinion since the court chose to ignore the claim altogether and focus entirely upon the issue of admissions." Petition at 34 n.4. Of course the fact that the state supreme court did not pass upon the constitutional issue in itself militates against review by this Court. Illinois v. Gates, supra. But more important than the fact the court below did not address the issue are the reasons for this fact. Obviously one of the reasons that the court "chose to ignore the claim altogether" was that the petitioner chose to ignore the

claim altogether in the trial court and state contemporaneous objection rules provide that state appellate courts will ordinarily not consider such claims. See State v. Evans, 165 Conn. 61, 69, 327 A.2d 576 (1973). The petitioner, moreover, all but chose to ignore the claim in his state supreme court brief. The petitioner devoted only three generally parenthetical paragraphs of his sixty-one page state appellate brief to the constitutional issue, and instead of distinctly identifying the constitutional question in his statement of issues merely reiterated there the same issue raised in the trial court: "Whether the trial court erred in failing to sustain the defendant's objections to the testimony of two Connecticut State Police Officers as to statements made by the defendant which defendant claimed were inadmissible hearsay? Petitioner's State Supreme Court Brief at 2, 56-57 (emphasis added). Thus the Connecti-

cut Supreme Court may quite understandably have never discovered the issue, or, having discovered it, may, in view of its own case law, have considered it improperly briefed and on that ground declined to address it. See New Haven Savings Bank v. Valley Investors, 174 Conn. 77, 84, 382 A.2d 321 (1977) (issue party introduced as "an afterthought in a terse statement in his brief" is inappropriate for review). Whether the explanation was state contemporaneous objection rules or state supreme court policy against reviewing claims improperly briefed, the Connecticut Supreme Court's decision not to entertain the petitioner's constitutional issue rests on independent and adequate state grounds which preclude further review by this Court. Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978).

The petitioner attempts to circumvent these jurisdictional barriers by asserting

that notwithstanding his failure to raise the constitutional issue in the trial court "the holding of the Connecticut Supreme Court raises the issue to one of constitutional dimension." Petition at 31 n.2. Such gamesmanship is unavailing. The "not pressed or passed upon" doctrine would rapidly become meaningless if a petitioner could avoid it merely by saying that a holding of a state appellate court which in all respects and for quite valid reasons addresses only a state law question in effect also violates his constitutional rights. The petitioner at most has a constitutional right to fair appellate consideration of his state law claim. He has no constitutional right to an accurate resolution of it. The "not pressed or passed upon" doctrine therefore precludes further consideration of the petitioner's first issue.

## B. Alternatively, The Issue Is Insubstantial On the Merits

In the unlikely event that this Court were to find no jurisdictional barriers to reviewing the petitioner's first issue, it should decline review on the ground that the issue is insubstantial on the merits. Petitioner admits that at the time he asked for a lawyer and indicated his desire to stop talking he was not in police custody and was in fact free to leave at any time. Petition at 32 n.3, 38. That being true, the case fits rather comfortably into the rationale of Jenkins v. Anderson, 447 U.S. 231 (1980), in which this Court held that the government may impeach a defendant through the use of his prearrest silence. Although in the present case the state used the invocation of the defendant's rights substantively rather than for impeachment, in neither case does the introduction of such evidence violate a person's privilege

against compelled self-incrimination. As the Jenkins Court held, only when governmental action, such as the making of an arrest, functions as an "inducement" for the accused to invoke his fifth amendment privilege does the introduction of evidence concerning that invocation infringe on the privilege. See also Fletcher v. Weir, 455 U.S. 603 (1982) (protections of the privilege attach only after suspect is in custody and police issue Miranda warnings). For this reason the lower federal courts have condemned the substantive use of statements revealing an invocation of constitutional rights made after arrest, see United States v. McDonald, 620 F.2d 559, 560-64 (5th Cir. 1980); United States v. Williams, 556 F.2d 65 (D.C. Cir.), cert. denied, 431 U.S. 972 (1977); United States v. Faulkenberry, 472 F.2d 879, 881-82 (9th Cir.), cert. denied, 411 U.S. 970 (1973), but, as far as can be ascertained, have never prohibited the use of such

statements when made prior to arrest. In this case, then, because the petitioner's decision to stop answering police questions was voluntary rather than compelled or induced by governmental arrest, the introduction of evidence of this decision did not violate his privilege against compelled self-incrimination. See generally Andreson v. Maryland, 427 U.S. 463 (1976) (privilege not violated by search warrant because no complusion).

## II. THE PETITIONER'S SECOND CLAIM WAS NEVER HERETOFORE IDENTIFIED AS A FEDERAL QUESTION AND IS INSUBSTANTIAL ON THE MERITS

### A. The Claim Was Never Heretofore Identified As a Federal Question

The petitioner also seeks a writ of certiorari on the ground that the trial court's instructions on the inconsistent statements of his wife, who was his chief alibi witness, "unfairly focused on [her] to the exclusion of all other witnesses,

invaded the province of the jury, and destroyed the perfect impartiality of the court, all in violation of petitioner's fourteenth amendment rights." Petition at 39 (capitalization deleted).[1] The petitioner presents no evidence, nor can he present any, to show that he ever properly identified this issue as a federal question in the courts below. Indeed, the Connecticut Supreme Court observed that "the defendant never makes clear the grounds, constitutional or otherwise, upon which error [in the instructions] should be found. Petition at

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1 The court instructed as follows:

> It is the province of the jury to determine the credibility, if any, to be giver the testimony of a witness who has been impeached. Evidence was offered in this case, as I remember it and, of course, this is for you to recall. Your recollection is controlling. I think there was evidence of statements, for example, by Mrs. Stepney which you may believe to have been inconsistent with her testimony. You heard the evidence and you heard her explanation as to some of it, anyway.

T.T. at 2206.

14A-15A. Only in response to this observation did the petitioner belatedly allege in his motion to reargue in the state supreme court that the jury charge violated his rights "under the Sixth and Fourteenth Amendments to the United States Constitution and Article First Section Eight of the Connecticut Constitution." Motion to Reargue at 1-2. Given that claims of invalid jury instructions may present state law as well as federal questions, see Anderson v. Harless, 103 S.Ct. 276 (1982), and that proper presentation of the federal question forms a prerequisite to this Court's jurisdiction, see Illinois v. Gates, supra; Tacon v. Arizona, 410 U.S. 351, 353 (1973), this Court should decline further consideration of the petitioner's newly raised federal question regarding jury instructions.

B. The Claim Is Insubstantial On the Merits

The petitioner points to no provision of the Considerations Governing Review on Certiorari that could even conceivably justify an allocation of this Court's scarce time to a reconsideration of whether a state trial court fairly characterized the testimony of his principal alibi witness. See Rule 17.1, Revised Rules of the Supreme Court of the United States. This Court has made it clear enough that it does not "grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925) (Holmes, J.). Into the very face of this admonition the petitioner's claim would have this Court wade through some 2,000 pages of transcript to determine whether other witnesses had testified as inconsistently as Mrs. Stepney, Petition at 45, whether Mrs. Stepney had sufficiently explained her inconsistencies,

Petition at 48, and whether the court's instructions had singled her out "to the exclusion of all of the [sic] witnesses . . . ." Id. It should be manifest that the fact-laden question here is of no interest to anyone other than the immediate parties involved and would, if resolved by this Court, have minimal or no precedential value for the legal system as a whole. Certiorari is entirely inappropriate under these circumstances.

Finally, without belaboring the merits, it should suffice to note that the Connecticut Supreme Court's resolution of the question is beyond reproach. This Court has long held that a trial judge may make fair comment on the evidence. See, e.g., Quercia v. United States, 289 U.S. 466, 469-70 (1932). The Connecticut Supreme Court found that the trial court's illustrative comment concerning contradictions in Mrs. Stepney's testimony was "certainly

'fair comment' on her testimony" because "[h]er cross-examination revealed numerous contradictions between her trial testimony and prior statements at the suppression hearing or to the police concerning the defendant's actions on the day of the murder." Petition at 16A. Such a factual finding is for conclusive determination by the state courts and is not open for reconsideration here. Wolfe v. North Carolina, 364 U.S. 177, 196 (1960).

## III. THE PETITIONER'S THIRD CLAIM WAS NEVER HERETOFORE IDENTIFIED AS A FEDERAL QUESTION AND IS INSUBSTANTIAL ON THE MERITS

The petitioner's third proposed basis for the granting of certiorari is the fact that the trial judge made a fleeting reference to the undeniable truth that the defendant had an interest in the verdict.[2]

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[2] The court instructed as follows:

In this case, the accused took the witness stand. He had a right to do so, and in (cont.)

Here again the petitioner never seasonably identified this claim as a federal question in the courts below. See Brief in Opp. supra pp. 12-14. On the merits, moreover, the claim is wholly without substance. The petitioner relies in the first instance on four decisions of this Court which he contends contradict the ruling in the court below. Petition at 32, 52-53. These decisions, however, are perfectly consistent with the challenged ruling. In two of them what prompted reversal was not just a reference to the defendant's interest in the outcome but rather a suggestion or characterization of the defendant's testimony or

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2(cont.) weighing the testimony of an accused person you should apply the same principles by which the testimony of other witnesses is tested. An accused person, having taken the witness stand, stands before you just like any other witness and is entitled to the same consideration and must have his testimony weighed in the same way as any other witness, including his interest in the verdict which you are about to render.

T.T. at 2211.

of all defendants' testimony as being fabricated. Quercia v. United States, 289 U.S. 466, 468-69 (1932);[3] Allison v. United States, 160 U.S. 203, 208-09 (1895).[4] In a

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[3] "And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty."

[4] It must be shown by the evidence that the party who was slain was at the time doing something that would satisfy a reasonable man, situated as was the defendant, that the deceased, William Allison, then and there was about to do that which would destroy the life of the defendant, and that he could not prevent it except by doing as he did do. The question as to whether that is the state of case or not is a question that is to be finally passed upon by the juries of the country, and by you in this case, and you must have something more tangible, more real, more certain, than that which is a simple declaration of the party who slays, made in your presence by him as a witness when he is confronted with a charge of murder. All men would say that. No man created would say otherwise when confronted by such circumstances, and the juries, as a matter of fact, would have nothing to do but to record the finding which was willed or established by the declaration of the party who did the killing."

(emphasis deleted).

third case this Court noted only that "[t]he trial judge did not charge the jury to treat the testimony of defendant in a manner different from that in which they treated the testimony of other witnesses . . .," Wilson v. United States, 162 U.S. 613, 621 (1896), something equally true here. See Brief in Opposition note 2 supra. Finally, in Hicks v. United States, 150 U.S. 442, 450-52 (1893), this Court expressed concern over an instruction which in some detail had referred to the defendant's interest in the outcome[5] but concluded that "[i]f this were the only objectionable language contained in

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5 "You are to consider his interest in this case; you are to consider his consequent motive growing out of that interest in passing upon the truthfulness or falsity of his statement. He is in an attitude, of course, where any of us, if so situated, would have a large interest in the result of the case, the largest, perhaps, we could have under any circumstances in life, and such an interest, consequently, as might cause us to make statements to influence a jury in passing upon our case that would not be governed by the truth; we might be led away from the truth because of our desire. Therefore it is but right, and it is your duty to view the statements of such a witness in the light of his attitude and in the light of other evidence."

the charge, we might hesitate in saying that it amounted to reversible error." Id. at 452.

Whatever doubt Hicks had left as to the validity of an interest in the outcome instruction was resolved decisively one year later in Reagan v. United States, 157 U.S. 301, 304-11 (1894), a case the petitioner elects not to cite. In Reagan this Court unanimously upheld an instruction which like the one at issue here informed the jury that "[t]he deep personal interest which [the defendant] may have in the result of the suit should be considered by the jury in weighing his evidence . . . ." Id. at 304. This Court's stamp of approval stemmed from the basic reality that "the interest of the defendant in the result of the trial is of a character possessed by no other witness . . . ." Id. at 310.

No subsequent opinion of this Court has ever questioned the correctness of the

Reagan decision. Nor is there any significant division of opinion among the lower federal courts. Of the eight Circuits that have considered the matter six have unequivocally approved the use of an instruction informing the jury that they may consider the defendant's interest in the outcome. See United States v. Figurski, 545 F.2d 389, 392 (4th Cir. 1976); United States v. Wiggins, 566 F.2d 944, 945 (5th Cir.), cert. denied, 436 U.S. 950 (1978); United States v. Ambrose, 483 F.2d 742, 753 (6th Cir. 1973); United States v. Wright, 542 F.2d 975, 985 (7th Cir. 1976), cert. denied, 429 U.S. 1073 (1977); Louie v. United States, 426 F.2d 1398, 1402 (9th Cir.), cert. denied, 400 U.S. 918 (1970); United States v. Hill, 470 F.2d 361, 363-65 (D.C. Cir. 1972). In the remaining two Circuits the courts have criticized the challenged instruction but have failed to find that its issuance constitutes reversible error. See

United States v. Schlesinger, 598 F.2d 722, 727 (2d Cir.), cert. denied, 444 U.S. 880 (1979); United States v. Standing Bear, 538 F.2d 196, 204 (8th Cir.), cert. denied, 429 U.S. 1025 (1976). And while a handful of states have found such an instruction prejudicial, see Petition at 55-56, such a division among the states illustrates only a disagreement on a matter of public policy and not, in light of Reagan, a matter of constitutional law. This Court long ago closed the door on the question at bar, see Reagan v. United States, supra, and it should not now be reopened.

## IV. THE ISSUE OF WHETHER THE ALLEGED ERRORS RAISED BY QUESTIONS 3 AND 4, WHEN COMBINED, DENIED PETITIONER DUE PROCESS IS NOT A PROPER BASIS FOR THE GRANTING OF THE WRIT OF CERTIORARI

The petitioner's final argument is that the whole exceeds the sum of its parts and that even if Questions 3 and 4 standing alone do no merit this Court's review then

when combined they do so. The short answer to such an argument is that "[t]his is not the supreme court of review for every case decided 'unjustly' by every court in the country." Rogers v. Missouri Pacific Railroad, 352 U.S. 518, 541 (1957) (Frankfurter, J., dissenting). Accord Maggio v. Tulford, 103 S.Ct. 2261, 2266 (1983) (Marshall, J., dissenting, quoting Vinson, C.J.). Whether the cumulative impact of the alleged errors in Questions 3 and 4 deprived the petitioner of a fair trial is a matter for too fact-laden and idiosynchratic to have any precedential value for the legal system as a whole or in any other way to justify the issuance of a writ of certiorari.

## CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

STATE OF CONNECTICUT
Respondent

By: ANNE C. DRANGINIS
Assistant State's Attorney
Judicial District of
Litchfield

/s/ CARL SCHUMAN
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Office of the Chief State's
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I hereby certify that three copies of this brief have been mailed by February 15, 1984 to James A. Wade and Sally S. King, Robinson, Robinson & Cole, 799 Main Street, Hartford, CT. 06103.

/s/ CARL SCHUMAN
CARL SCHUMAN
Assistant State's Attorney

UNITED STATES SUPREME COURT

NO. 83-949

WILLIAM H. STEPNEY, JR.,
Petitioner :

V.

STATE OF CONNECTICUT,
Respondent : FEBRUARY 8, 1984

RECEIVED
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SUPREME COURT, U.S.

MOTION FOR DAMAGES

Pursuant to Rule 49.2, the respondent State of Connecticut moves for damages in the amount of $500 on the ground that the petition for certiorari is frivolous. As argued in the state's Brief in Opposition to the Petition for Certiorari, none of the four issues raised by the petitioner in this Court was seasonably presented as a federal question in the Connecticut Supreme Court. Moreover, as also argued, these issues are wholly insubstantial on the merits. Indeed, the petitioner raised as one of his issues the contention that the trial court erred in instructing the jury that they may consider the defendant's interest in the verdict, but the petitioner failed even to cite much less attempt to discredit this Court's decision in Reagan v. United States, 157 U.S. 301 (1894), which upheld the validity of precisely this instruction.

The Court recently granted a respondent's Rule 49.2 motion for $500 damages in Tatum v. Regents of the University of Nebraska, 103 S.Ct. 3084 (1983). Such an award in the present case will help compensate the State for expenses that it should not have had to incur as well as deter other frivolous petitions for certiorari. For these reasons, the motion for damages should be granted.

RESPECTFULLY SUBMITTED,

STATE OF CONNECTICUT
Respondent

Carl Schuman

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CERTIFICATION

I hereby certify that a copy of the above was mailed to James A. Wade, Esquire and Sally S. King, Esquire, Robinson, Robinson and Cole, 799 Main Street, Hartford, Connecticut 06103, Counsel for the Petitioner.

Carl Schuman

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Office - Supreme Court, U.S
FILED
FEB 13 1984
ALEXANDER L. STEVAS
ERK

UNITED STATES SUPREME COURT

NO. 83-949

WILLIAM H. STEPNEY :

VS. :

STATE OF CONNECTICUT : FEBRUARY 9, 1984

OPPOSITION TO MOTION FOR DAMAGES

Petitioner William H. Stepney in the above-captioned matter hereby opposes and responds to the State's Motion for Damages dated February 8, 1984 as follows.

The statement in said motion, "[a]s argued in the state's Brief in Opposition to the Petition for Certiorari, none of the four issues raised by the petitioner in this Court was seasonably presented as a federal question in the Connecticut Supreme Court" is entirely false. First, petitioner has not received, as of the date of this response, a copy of the State's Brief in Opposition and therefore cannot comment on matters raised or argued therein.

Secondly, issue two in petitioner's appeal to the Connecticut Supreme Court concerned whether or not the trial court erred in its instructions to the jury by focusing on the credibility of the defendant and his wife to the exclusion of all other witnesses. The claim of error was based on the deprivation of defendant's

Fourteenth and Fifth Amendment rights to due process caused by the combination of the trial court's focusing only on the testimony of defendant's wife and then commenting on the defendant's interest in the outcome of his case.

In his brief before the Connecticut Supreme Court on this issue, defendant specifically raised a Fourteenth and Fifth Amendment claim with regard to the trial court's jury instructions. Further, contrary to the State's assertion that such claim is "frivolous" and "wholly insubstantial," and that the case of Reagan v. United States, 157 U.S. 301 (1894) disposes of the matter, petitioner pointed to Quercia v. United States, 289 U.S. 466, 471 (1933), a later decision of this Court holding that the testimony of the defendant/witness is to be accorded the same weight as that of any other witness, and to State court decisions and several Eighth Circuit Court of Appeals decisions condemning the use of a charge calling to the jury's attention any interest the defendant might have in the outcome of the case. See United States v. Brown, 453 F.2d 101, 107 (8th Cir. 1971), cert. denied, 404 U.S. 978 (1972); United States v. Bear Killer, 534 F.2d 1253, 1259 (8th Cir.), cert. denied, 429 U.S. 846 (1976); United States v. Standing Soldier, 538 F.2d 196, 204 (8th Cir.), cert. denied, 429 U.S. 1025 (1976).

Additionally, it should be noted that one of the issues raised by petitioner only arose as a result of the decision by the Connecticut

Supreme Court on his appeal. That issue concerns whether or not it is proper to admit testimony by an accused that he wants to stop answering questions and consult with an attorney, together with a description of his demeanor while making such statements. On appeal below, as part of his claim that statements preceding his request for counsel and refusal to answer further questions should not have been admitted because they were inadmissible hearsay, petitioner specifically noted the prejudice that resulted from the admission of testimony concerning the termination of petitioner's interview. See Brief of Appellant at 55. See also Reply Brief of Appellant.

Thus, it is clear that the State's motion for damages should be denied. It should also be noted that the State in the present case files its request for damages pursuant to Rule 49.2 of this Court. Professor Moore, in his treatise, quoting the court in State of West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1092 (2d Cir.), cert. denied sub nom Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971) specifically notes that "[t]he imposition of such sanctions, however, is highly unusual and requires a clear showing of bad faith on the part of appellants." 13 Moore's Federal Practice ¶849.03 (1982).[1]

Finally, it should be pointed out that the emphasis Professor Moore places in his treatise on the use of Rule 49.2 is on civil

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[1]In the present case, it is deserving of notice that the petition for writ of certiorari was not dismissed out of hand. The Court specifically requested the State to file a brief after they declined to do so.

matters and the loss of money interest caused by delay and not in criminal matters. In the present case, defendant, convicted of murder and sentenced to life imprisonment, seeks only to ensure that all the safeguards afforded him by the United States Constitution and the Connecticut Constitution have been accorded him in the rendering of that judgment. For such conduct he should not be penalized.

PETITIONER

By _____

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By _____

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CERTIFICATION

This is to certify that a copy of the above was mailed on February 9, 1984 to Carl Schuman, Assistant State's Attorney, Office of the Chief State's Attorney, 100 South Turnpike Road, Box 5000, Wallingford, CT 06492.

_____
Sally S. King